Ponce Park Residences

Planning & Zoning Board

June 8, 2022

Table of Contents	

Pagination

* So. 2d

Majority Opinion > Concurring Opinion > Table of Cases

District Court of Appeal of Florida
Fourth District

City of Dania, Petitioner,
v.
Florida Power & Light, a Florida corporation, Respondent.

No. 97-1657.

January 21, 1998

Order Denying Rehearing August 12, 1998

E. Bruce Johnson, Michael T. Burke, and Christine M. Duignan of Johnson, Anselmo, Murdoch, Burke & George, Fort Lauderdale, for petitioner.

Jean G. Howard, Miami, for respondent.

[*814] PARIENTE, BARBARA J., Associate Judge.

Petitioner, City of Dania (City), timely seeks certiorari review of an order of the circuit court, sitting in its appellate capacity, which quashed the City's decision to deny Florida Power & Light's (F P & L) petition for a special zoning exception. We grant certiorari because we conclude that the circuit court substituted its evaluation of the evidence for that of the City and further imposed an improper legal burden on the City in reversing the denial of the zoning request.

F P & L applied for a special zoning exception to build an electrical substation on a parcel in the City zoned C-2 commercial, which adjoined residential property. According to the City code, the use of the property for an electrical substation is not a permitted use, but may be allowed by special exception. *See* Dania City Code 6.40.

The City Planning & Zoning Board recommended denial of the application. After a de novo review and a public hearing on the application, where both sides presented testimony, the City Commission voted to deny the application.

The Dania City Code provides that "special exception uses ... shall be permitted only upon authorization by the city commission provided that such uses shall be found by the city commission to comply with" seven

requirements. 6.40. The City defends its decision to deny the application based on its assertion that F P & L's proposal for an electrical substation failed to meet two of the seven requirements for a special exception use:

> (c) That the use will not cause substantial injury to the value of other property in the neighborhood where it is to be located.
>
> (d) That the use will be compatible with adjoining development and the intended purpose of the district in which it is to be located.

6.40(c),(d).

In its petition for certiorari to our court, the City asserts that because there was sufficient lay and expert testimony to support the City's denial of a special exception, the circuit **[*815]** court impermissibly substituted its judgment as fact finder for that of the City. The City further argues that the circuit court erred by imposing a higher burden of proof for denial of an application than the law requires when it stated that the City's burden was "especially heavy where ... the special exception request is for essential services." We agree with both arguments.

Our review of the circuit court's decision is limited to a determination of whether the circuit court applied the correct law, which is synonymous with a determination of whether the circuit court departed from the essential requirements of law. *See Haines City Community Dev. v. Heggs*, 658 So.2d 523, 530 (Fla.1995).

We first address the City's argument that the circuit court departed from the essential requirements of law by concluding that F P & L met its burden of showing that the use of the property for an electrical substation complied with the criteria set forth in the City code, and conversely that the City did not meet its burden of showing adverse harm to the public interest.

When a circuit court reviews a local administrative action by certiorari, the circuit court functions not as the fact finder, but in its appellate role.[1] Accordingly, its review of findings of fact is extremely limited:

> [C]ertiorari in circuit court to review local administrative action under Florida Rule of Appellate Procedure 9.030(c)(3) is not truly discretionary common-law certiorari, because the review is of right. In other words, in such review *the circuit court functions as an appellate court, and, among other things, is not entitled to reweigh the evidence or substitute its judgment for that of the agency* .

Id. at 530 (citations omitted) (emphasis supplied). Thus, when a circuit court reverses the zoning decision of a city commission because it disagrees with the evaluation of the evidence, the circuit court has applied the wrong standard of review to the decision. *See City of Fort Lauderdale v. Multidyne Med. Waste Management, Inc.*, 567 So.2d 955, 957 (Fla. 4th DCA 1990); *Metropolitan Dade County v. Blumenthal*, 675 So.2d 598, 608-09 (Fla. 3d DCA 1995).[2]

F P & L argues that this court cannot again review the issue of whether there was substantial competent evidence to support the City's decision. While we are mindful that our task is not to reweigh the evidence, *see Haines*, 658 So.2d at 530, it is part of this court's responsibility to determine whether the circuit court exceeded

its scope of review and substituted its own factual findings for those of the City. *See Multidyne*, 567 So.2d at 958; *Blumenthal*, 675 So.2d at 606. If we failed to grant relief where a single circuit court judge sitting in his appellate capacity disregarded substantial competent evidence relied on by a governmental entity in making a zoning decision, this could, in itself, constitute a miscarriage of justice.

In *Pompano Beach Police & Firemen's Pension Fund v. Franza*, 405 So.2d 446 (Fla. 4th DCA 1981), this court, in quashing the decision of the circuit court, held that:

> The question of the weight and credibility of the evidence is for the administrative agency and not the reviewing court, even though the court may have reached a different conclusion on the same testimony.
>
> The court should not substitute its judgment for that of the administrative fact finder who heard the testimony and was in a position to evaluate the credibility of witnesses.

Id. at 447 (quoting *Metropolitan Dade County v. Mingo*, 339 So.2d 302, 304 (Fla. 3d DCA 1976)). The test is not whether the circuit court would have reached the same conclusion based on the evidence, but "whether **[*816]** there was any substantial competent evidence upon which to base the commission's conclusion." *Multidyne*, 567 So.2d at 957.

F P & L asserts that the testimony of the citizens cannot be relied upon in denying a petition for a zoning exception, citing *Pollard v. Palm Beach County*, 560 So.2d 1358 (Fla. 4th DCA 1990). This case is distinguishable from *Pollard* where our court concluded that there was "literally no competent evidence" to support the denial of the special exception because the denial was based **only** on the unsubstantiated comments of area residents. 560 So.2d at 1360; *see also City of Apopka v. Orange County*, 299 So.2d 657, 659-60 (Fla. 4th DCA 1974). Here, the City heard from members of the public and from expert witnesses on both sides of the controversy. Therefore, we need not reach the decision whether the testimony of the area residents **alone** would have been sufficient to support a denial of a special exception.

The role of the governmental entity is to arrive at sound decisions affecting the use of property within its domain. This includes receiving citizen input regarding the effect of the proposed use on the neighborhood, especially where the input is fact-based. *See Grefkowicz v. Metropolitan Dade County*, 389 So.2d 1041 (Fla. 3d DCA 1980); *Blumenthal*.

The public hearing included expert testimony from a real estate appraiser and a certified land planner. Both opined that the substation would depress adjoining residential property values. F P & L argues here, as it did to the circuit court, that the method of analysis employed by the City's expert appraiser in arriving at his conclusion was flawed because the substations considered by the expert in his study were not sufficiently similar to the one proposed in terms of landscaping and setback.

F P & L also challenges the certified land planner's opinion that no amount of landscaping or setback could make the electrical substation a compatible use in a residential neighborhood. However, these arguments address the weight and credibility of the expert opinions--issues that were for the City as fact finder to decide, not the circuit court as a reviewing court. *See Franza*, 405 So.2d at 447; *see also Blumenthal*, 675 So.2d at

606. "Where the evidence is conflicting, the courts should not interfere with an administrative decision to deny a special exception." *City of St. Petersburg v. Cardinal Indus. Dev. Corp.*, 493 So.2d 535, 538 (Fla. 2d DCA 1986).

The circuit court's order contains many conclusory statements, but fails to include specific findings and reasons for its conclusions, hampering our review of its order. The order does not explain why the expert testimony presented by the City does not constitute substantial competent evidence.

We can discern no valid reason why the City, as fact finder, should have been required to disregard the expert testimony and the testimony of the area residents who stated they would not have bought homes in the neighborhood if an electrical substation had been built.[3] The record as a whole contains substantial competent evidence to support a denial of the special exception to build an electrical substation based on two of the City's seven requirements for a special exception: "substantial injury to the value of other property" and incompatibility with "adjoining development and the intended purpose of the district." Dania City Code 6.40(c), (d); *see also Metropolitan Dade County v. Sportacres Dev. Group, Inc.*, 698 So.2d 281 (Fla. 3d DCA 1997); *City of St. Petersburg; Odham v. Petersen*, 398 So.2d 875, 877 (Fla. 5th DCA 1981), *approved in pertinent part* , 428 So.2d 241 (Fla.1983).

[*817] We finally address the argument made by the City that the circuit court improperly imposed a higher burden of proof on it than the law allows. The shifting burden of proof applicable to a special exception case is set forth in *Irvine v. Duval County Planning Comm'n*, 495 So.2d 167 (Fla.1986). According to *Irvine*, once the party seeking the special exception meets the initial burden of showing compliance with the statutory criteria for granting an exception, the burden shifts to the governmental entity to demonstrate, by competent substantial evidence, that the special exception does not meet the standards in the zoning ordinance and is in fact, adverse to the public interest. Id.; *see alsoPollard*, 560 So.2d at 1359.

We find no case law to support the circuit court's conclusion that, because the special exception is for essential services, the City had an "especially heavy burden." *Irvine*'s shifting burden applies to all requested special exceptions. Further, there is no special provision in the City's code imposing different standards for special exceptions related to a public purpose. The circuit court's imposition of a higher burden on the City than that enunciated in *Irvine* also constituted a departure from the essential requirements of law and may have contributed to its erroneous conclusions concerning the lack of substantial competent evidence.

Because the circuit court appears to have substituted its evaluation of the evidence for that of the City and also imposed an incorrect burden of proof on the City, the circuit court departed from the essential requirements of law. The petition is granted and the circuit court opinion is quashed. This case is remanded for proceedings consistent with this opinion.

WARNER and POLEN, JJ., concur.

ON MOTION FOR REHEARING

The motion for rehearing is hereby denied.

POLEN, J., and PARIENTE, BARBARA J., Associate Judge, concur.

WARNER, J., concurs specially with opinion.

WARNER, Judge, concurring specially.

While I concur in the denial of rehearing, I do so on the ground that the order should have been quashed because the court imposes an "especially heavy burden" on the city to demonstrate that the special exception does not meet the standards of the zoning ordinance. As to whether or not it is proper for us to grant certiorari when we conclude that the circuit court exceeded its scope of review and substituted its own factual findings for those of the agency, I am less clear. Although I was a member of the panel of *City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc.*, 567 So.2d 955 (Fla. 4th DCA 1990), I question whether we faithfully applied the holding of *Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals*, 541 So.2d 106 (Fla.1989).

In *City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc.*, 526 So.2d 775 (Fla. 4th DCA 1988), the City of West Palm Beach ("City") brought a petition for writ of certiorari to our court after the circuit court reversed a decision of the zoning board of appeals, which had denied a property owner's application to convert its residential property to a preschool. The circuit court found that there was no substantial competent evidence to support the City's denial of the application. Our court reviewed the evidence presented and determined that it contained competent substantial evidence on both sides of the issue. Thus, the circuit court's conclusion to the contrary, that there was not substantial evidence to support the denial, constituted a reweighing of the evidence before the zoning board, which amounted to a substitution of the circuit court's judgment for that of the zoning board. Finding this to be impermissible, we granted the petition and quashed the order.

The respondent subsequently petitioned the supreme court for review. The court quashed our decision and distinguished review **[*818]** by the appellate courts from review by the circuit courts in certiorari proceedings. It stated that:

> In *City of Deerfield Beach v. Vaillant*, 419 So.2d 624 (Fla.1982), the Court clearly set forth the standards governing certiorari review.
>
> When the circuit court reviews the decision of an administrative agency under Florida Rule of Appellate Procedure 9.030(c)(3), there are *three* discrete components of its certiorari review.
>
> > Where a party is entitled as a matter of right to seek review in the circuit court from administrative action, the circuit court must determine whether procedural due process is accorded, whether the essential requirements of the law have been observed, and whether the administrative findings and judgment are supported by competent substantial evidence.
>
> *Vaillant*, 419 So.2d at 626. In so doing, the circuit court is not permitted to reweigh the evidence

> nor to substitute its judgment for that of the agency. *Bell v. City of Sarasota*, 371 So.2d 525 (Fla. 2d DCA 1979).
>
> In turn, the standard of review to guide the district court when it reviews the circuit court's order under Florida Rule of Appellate Procedure 9.030(b)(2)(B) is necessarily narrower. The standard for the district court has only *two* discrete components.
>
> > The district court, upon review of the circuit court's judgment, then determines whether the circuit court afforded procedural due process and applied the correct law.
>
> ....
>
> We hold that the principles expressed by the Court in *Vaillant* clearly define the standards of review applicable here. There was no contention of a denial of due process and the district court of appeal did not find that the trial judge applied an incorrect principle of law. The district court of appeal simply disagreed with the circuit court's evaluation of the evidence.
>
> Accordingly, we reaffirm *Vaillant* and quash the decision of the district court.

Education Dev., 541 So.2d at 108-09 (emphases in original). In dissent, Justice MacDonald cautioned that the majority was

> [clothing] trial judges with powers of absolute czars in zoning matters.
>
> All that the trial judge would have to do to insulate his actions from review would be to couch his order mandating reversal in terms of "there is no competent evidence to deny the zoning application." Surely we do not want to tie the hands of the district courts of appeal in such situations. Rather, the appellate courts should be able to pass on the issue of whether there was, indeed, competent substantial evidence to support the conclusion of the zoning board.

Id. at 109. What I must conclude from both the majority and dissent in *Education Development* is that the district courts do *not* have the review power to reverse a trial court's determination regarding whether competent substantial evidence exists to support the agency action.

In *Multidyne*, 567 So.2d at 955, however, we again quashed the order of a circuit court which found that there was no substantial evidence to support the denial of a permit application. While we cited *Education Development*, we again considered the evidence before the agency and determined that there was conflicting evidence on the issue, and therefore quashed the circuit court's contrary conclusion on that basis. I can discern no difference in what we did in *Multidyne* and what we did in *Education Development* which was quashed by the supreme court.

Metropolitan Dade County v. Blumenthal, 675 So.2d 598, 608-09 (Fla. 3d DCA 1995), *rev. dismissed*, 680 So.2d 421 (Fla.1996), states that:

> All the district courts that have addressed this scope of review issue are in accord that where the circuit court applies an incorrect legal standard and erroneously determines that a zoning decision

> is not supported by substantial competent evidence, or where the record is clear that the court has impermissibly reweighed the evidence, then the lower court has departed from the essential requirements of law and certiorari is available to the aggrieved party.

[*819] The cases cited by the third district, however, do not all stand for that proposition. For instance, *Maturo v. City of Coral Gables*, 619 So.2d 455, 457 (Fla. 3d DCA 1993), quashes a circuit court decision for applying the incorrect law in interpreting a zoning ordinance, not in evaluating competent substantial evidence, although it does evaluate the facts of the case in light of its determination of the correct zoning law to apply. *See also Herrera v. City of Miami*, 600 So.2d 561, 562-63 (Fla. 3d DCA 1992). Furthermore, three cited cases predate *Education Development*.[1] Thus, *Blumenthal*'s blanket statement is not in accord with most of the case law cited and is not consistent with *Education Development*.

Orange County v. Lust, 602 So.2d 568, 572 (Fla. 5th DCA 1992), relied on our opinion in *Multidyne*, but I think *Orange County* may conflict with *St. Johns County v. Owings*, 554 So.2d 535, 537 (Fla. 5th DCA 1989), which states that:

> the circuit court's *weighing of the evidence* is not subject to review by this court, as long as the correct standard of law has been applied. Regardless of whether this court would have decided the issues before the circuit court differently, a full de novo review of the county's decision by this court is not authorized, as *Education Development Center* and *City of Deerfield Beach v. Vaillant* make clear.

(emphasis added).

Respondent has also brought to our attention *Manatee County v. Kuehnel*, 542 So.2d 1356 (Fla. 2d DCA 1989). In that case, the circuit court had reversed the agency, finding that there was no competent evidence before the County Commission to support the decision to deny rezoning. Relying on *Education Development*, the second district said:

> The circuit court in this case, properly acting as an appellate court ..., reviewed the record of the county commission's hearing on the issue and determined that no substantial, competent evidence supported the county commission's decision. We find that the county was afforded due process and the circuit court applied the correct law. This court cannot disagree with the circuit court's evaluation of the evidence and substitute its judgment for that of the circuit court.

Id. at 1358.

I cannot reconcile *Multidyne*, *Blumenthal*, and the instant case with *Owings* and *Kuehnel*. More importantly, I think *Multidyne* and *Blumenthal* are directly contrary to *Education Development*. It appears to me that confusion continues as to the appellate courts' proper scope of review in certiorari proceedings from the Circuit Court sitting in its appellate capacity. *Multidyne* and *Blumenthal*, as well as our majority opinion in this case, have simply collapsed the third component of circuit court review of agency action, namely its authority to review whether the administrative findings and judgment are supported by competent substantial evidence, into the consideration of whether the circuit court applied the correct law. This was disapproved by *Education*

Development in quashing this court's decision, and nothing in *Haines City Community Development v. Heggs*, 658 So.2d 523 (Fla.1995), would suggest that district court review should be expanded to review competent substantial evidence determinations.

Because the circuit court applied the incorrect law in determining the burden of proof, it is still appropriate to quash the decision and remand for further proceedings. However, I disagree with the majority decision to the extent that it reviews the circuit court's determination of whether competent substantial evidence supported the agency decision. Based on *Education Development*, I conclude that this issue is not within the scope of our review.

Majority Opinion Footnotes

*fn*1. In the Seventeenth Judicial Circuit, unlike in the Fifteenth Judicial Circuit, petitions for writs of certiorari in zoning or administrative cases, as well as appeals from the county court to the circuit court, are handled by a single circuit court judge rather than an appellate panel of three. *SeeState v. Frazee*, 617 So.2d 350, 352 n. 1 (Fla. 4th DCA 1993) (Farmer, J., dissenting); *cf.State v. Shaw*, 643 So.2d 1163 n. 1 (Fla. 4th DCA 1994). The City does not challenge this procedure.

*fn*2. Judge Cope's dissent adopted as the opinion of the court upon rehearing en banc.

*fn*3. The City points to statements made by the individual Commissioners when voting to deny the request. It would be inappropriate for us to rely on the Commissioners' individual comments rather than on the decision of the City as a whole. *See Metropolitan Dade County v. Blumenthal*, 675 So.2d 598, 604 (Fla. 3d DCA 1995). There were no official findings of fact made by the City, but F P & L did not attack the City's decision on that basis, either in the circuit court or in this court. The denial is amply supported by the record. *See Odham v. Petersen*, 398 So.2d 875, 877 (Fla. 5th DCA 1981), *approved in pertinent part*, 428 So.2d 241 (Fla.1983); *City of St. Petersburg v. Cardinal Indus. Dev. Corp.*, 493 So.2d 535, 538 (Fla. 2d DCA 1986). However, the failure of a governmental entity to make official findings of fact makes the review process more difficult.

Concurring Opinion Footnotes

*fn*1. *SeeCity of Deland v. Benline Process Color Co.*, 493 So.2d 26, 28 (Fla. 5th DCA 1986); *Board of County Comm'rs of Pinellas County v. City of Clearwater*, 440 So.2d 497, 499 (Fla. 2d DCA 1983); *Town of Mangonia Park v. Palm Beach Oil, Inc.*, 436 So.2d 1138, 1139 (Fla. 4th DCA 1983).

Table of Cases

Haines City Community Dev. v. Heggs, 658 So.2d 523, 530 (Fla.1995)

City of Fort Lauderdale v. Multidyne Med. Waste Management, Inc., 567 So.2d 955, 957 (Fla. 4th DCA 1990)

Metropolitan Dade County v. Blumenthal, 675 So.2d 598, 608-09 (Fla. 3d DCA 1995)

Pompano Beach Police & Firemen's Pension Fund v. Franza, 405 So.2d 446 (Fla. 4th DCA 1981)

Metropolitan Dade County v. Mingo, 339 So.2d 302, 304 (Fla. 3d DCA 1976)

Pollard v. Palm Beach County, 560 So.2d 1358 (Fla. 4th DCA 1990)

City of Apopka v. Orange County, 299 So.2d 657, 659-60 (Fla. 4th DCA 1974)

Grefkowicz v. Metropolitan Dade County, 389 So.2d 1041 (Fla. 3d DCA 1980)

City of St. Petersburg v. Cardinal Indus. Dev. Corp., 493 So.2d 535, 538 (Fla. 2d DCA 1986)
Metropolitan Dade County v. Sportacres Dev. Group, Inc., 698 So.2d 281 (Fla. 3d DCA 1997)
City of St. Petersburg; Odham v. Petersen, 398 So.2d 875, 877 (Fla. 5th DCA 1981), approved in pertinent part, 428 So.2d 241 (Fla.1983)
Irvine v. Duval County Planning Comm'n, 495 So.2d 167 (Fla.1986)
City of Fort Lauderdale v. Multidyne Medical Waste Management, Inc., 567 So.2d 955 (Fla. 4th DCA 1990)
Education Development Center, Inc. v. City of West Palm Beach Zoning Board of Appeals, 541 So.2d 106 (Fla.1989)
City of West Palm Beach Zoning Board of Appeals v. Education Development Center, Inc., 526 So.2d 775 (Fla. 4th DCA 1988)
City of Deerfield Beach v. Vaillant, 419 So.2d 624 (Fla.1982)
Bell v. City of Sarasota, 371 So.2d 525 (Fla. 2d DCA 1979)
Metropolitan Dade County v. Blumenthal, 675 So.2d 598, 608-09 (Fla. 3d DCA 1995), rev. dismissed, 680 So.2d 421 (Fla.1996)
Maturo v. City of Coral Gables, 619 So.2d 455, 457 (Fla. 3d DCA 1993)
Herrera v. City of Miami, 600 So.2d 561, 562-63 (Fla. 3d DCA 1992)
Orange County v. Lust, 602 So.2d 568, 572 (Fla. 5th DCA 1992)
St. Johns County v. Owings, 554 So.2d 535, 537 (Fla. 5th DCA 1989)
Manatee County v. Kuehnel, 542 So.2d 1356 (Fla. 2d DCA 1989)
Haines City Community Development v. Heggs, 658 So.2d 523 (Fla.1995)
State v. Frazee, 617 So.2d 350, 352 n. 1 (Fla. 4th DCA 1993)
State v. Shaw, 643 So.2d 1163 n. 1 (Fla. 4th DCA 1994)
Metropolitan Dade County v. Blumenthal, 675 So.2d 598, 604 (Fla. 3d DCA 1995)
Odham v. Petersen, 398 So.2d 875, 877 (Fla. 5th DCA 1981), approved in pertinent part, 428 So.2d 241 (Fla.1983)
City of St. Petersburg v. Cardinal Indus. Dev. Corp., 493 So.2d 535, 538 (Fla. 2d DCA 1986)
City of Deland v. Benline Process Color Co., 493 So.2d 26, 28 (Fla. 5th DCA 1986)
Board of County Comm'rs of Pinellas County v. City of Clearwater, 440 So.2d 497, 499 (Fla. 2d DCA 1983)
Town of Mangonia Park v. Palm Beach Oil, Inc., 436 So.2d 1138, 1139 (Fla. 4th DCA 1983)

Pagination

* So. 3d

** BL

Opinion >

District Court of Appeal of Florida, First District.

KATHERINE'S BAY, LLC, Intervenor, Appellant, v. Ronald J. FAGAN and Citrus County, Appellees.

No. 1D10-939.

December 14, 2010.

[*20]

[EDITORS' NOTE: THIS PAGE CONTAINS HEADNOTES. HEADNOTES ARE NOT AN OFFICIAL PRODUCT OF THE COURT, THEREFORE THEY ARE NOT DISPLAYED.] **[*21]**

Clark A. Stillwell, Inverness, for Appellant.

Shaw P. Stiller, General Counsel, Department of Community Affairs, Tallahassee, and Denise A. Lyn, Inverness, for Appellees.

LEWIS, J.

Katherine's Bay, LLC, Appellant, seeks review of a final order issued by the Administration Commission ("the Commission"), which adopted an administrative law judge's ("ALJ") holding that a small-scale development amendment ("the Amendment") to Citrus County's Comprehensive Plan ("the Plan") was invalid because it rendered the Plan internally inconsistent. The ALJ and the Commission recognized two grounds for finding the Amendment inconsistent with the Plan: first, that it violated a policy in the Plan's Future Land Use Element ("FLUE") requiring compatibility of land uses; and second, that it violated a policy in the Plan's FLUE requiring the County to guide future development to areas with minimal environmental limitations. Appellant challenges both grounds. As to the first ground, Appellant argues that there was a lack of competent, substantial evidence to support the ALJ's finding that the Amendment approved a future land use designation that was incompatible with the surrounding uses. We agree. As to the second ground, Appellant argues both that there was a lack of

competent, substantial evidence to support the ALJ's factual findings and that the ALJ's ultimate conclusion resulted from an erroneous construction of the Plan. While we do find competent, substantial evidence of the findings the ALJ made in relation to the second ground, we hold that the findings did not support the conclusion that the Amendment rendered the Plan internally inconsistent. Because the ALJ's conclusion that the Amendment rendered the Plan internally inconsistent is not supported by either of the FLUE policies at issue, we reverse and remand to the Commission for reinstatement of the ordinance. **[*22]**

I. Facts and Procedural History

On May 26, 2009, the Citrus County Board of County Commissioners adopted an ordinance that amended the Plan's Generalized Future Land Use Map ("GFLUM"), which is a part of the FLUE. The Amendment changed the future land use designation of a 9.9-acre parcel of land owned by Appellant, based on Appellant's application for such a change.

The subject property is located in a geographic region defined by Citrus County as the "Coastal Area." According to the Plan, "[t]he Coastal Area parallels the Gulf of Mexico, and the boundary may be described as following the west side of US-19 north from the Hernando County line to the Withlacoochee River." The Plan notes that "[t]his boundary is the basis for an environmentally sensitive overlay zone to be used for land use regulatory purposes."

Before the Amendment, the subject property **[**2]** was designated Low Intensity Coastal and Lakes ("CL"), which the Plan defines in pertinent part as follows:

Low Intensity Coastal and Lakes (CL)

This land use category designates those areas having environmental characteristics that are sensitive to development and therefore should be protected. Residential development in this district is limited to a maximum of one dwelling unit per 20 acres. . . .

. . . .

In addition to single family residential development, the following land uses may be allowed provided the permitted use is compatible with the surrounding area, and standards for development are met as specified in the Citrus County Land Development Code (LDC)[:]

• Multifamily residences (in existing platted areas only or in lieu of clustering single family units at a density of one unit per lot of record and requiring the recombination of said lots. For example, a duplex requires two lots to be recombined into a single parcel, a quadruplex four lots, etc.)

• Recreational uses

• Agricultural and Silviculture uses

• Public/Semi-Public, Institutional facilities

• Home occupations

• New railroad right-of-way, storage facilities, or related structures

• Communication towers

• Utilities

• Commercial fishing and marina related uses

• Commercial uses that are water related, water dependent, or necessary for the support of the immediate population!;.]

The Amendment changed the subject property's future land use category from CL to Recreational Vehicle Park/Campground ("RVP"), which the Plan defines in pertinent part as follows:

Recreational Vehicle Park/Campground (RVP)

This category is intended to recognize existing Recreational Vehicle (RV) Parks and Campgrounds, as well as to provide for the location and development of new parks for recreational vehicles. Such parks are intended specifically to allow temporary living accommodation for recreation, camping, or travel use.

. . . .

New RV parks shall be required to preserve thirty percent (30%) of the gross site area as permanent open space, consistent with Policy 17.15.11 of this Plan. **[*23]**

In addition to RV/campsite development, the following land uses as detailed in the Land Development Code, shall be allowed provided the permitted use is compatible with the surrounding area, and standards for development are met as specified in the County Land Development Code:

• Recreational Uses

• Agricultural and Silvicultural Uses

• Public/Semi-Public, Institutional Facilities

• Convenience retail and personal services to serve park visitors and guests up to one percent of the gross site area, not to exceed 5,000 square feet, located within the development and not accessible from any external road[.]

After the Amendment changing the subject property's future land use category from CL to RVP was adopted, Appellee, the owner of neighboring property, challenged the Amendment under the procedure set forth in section 163.3187(3)(a), Florida Statutes (2008). Appellee argued that the Amendment was not "in compliance" with the Local Government Comprehensive Planning and Land Development Regulation Act ("the Act") because **[**3]** it rendered the Plan internally inconsistent. Appellee identified two policies in the FLUE, among others, that he claimed were inconsistent with the Amendment. Those policies are 17.2.7 and 17.2.8, and they provide as follows:

Policy 17.2.7 The County shall guide future development to the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations and the availability of necessary services.

Policy 17.2.8 The County shall utilize land use techniques and development standards to achieve a functional and compatible land use framework which reduces incompatible land uses.

Appellant intervened in the proceedings, and the matter proceeded to a section 120.57 hearing.

The parties stipulated that the subject property is located across the road from Appellee's property, which is on the Homosassa River, and that the subject property is bordered in all directions by property designated as either CL or Coastal and Lakes Residential ("CLR"). They also stipulated that there exists on Appellant's property a parcel designated Coast-al/Lakes-Commercial ("CLC")[fn1] and that this property is being used as an RV park because this use of the property is vested. Further, they stipulated that Appellee's property was in the Coastal High Hazard Area ("CHHA").

At the hearing, Appellee supported his argument that the Amendment rendered the subject property incompatible with the surrounding uses primarily by presenting his own testimony and that of his neighbor. Appellee described the beauty and peacefulness of the area and opined that the introduction of another RV park into the area would lead to increased traffic, litter, noise, and light pollution. He testified that the vested RV park currently existing on Appellant's property is an "eyesore" that "looks like a bunch of junk stored on the

front lawn." Appellee also testified that, in 1993, there was a major flood in the area around his home, which was so severe that he had to tie boats to his mailbox to keep them from floating down **[*24]** the road. He was concerned that the KV park Appellant planned to develop on the subject property would require him to manage even more debris in the event of a natural disaster. Appellee also expressed concern that the RV park would decrease his property value. A neighbor expressed the same concerns about the potential for increased traffic and decreased property values in the area.

The evidence concerning the subject property's environmental limitations came in the form of the County Staffs report and the testimony of Dr. Timothy Pitts and Sue Farnsworth, both of whom were employed by the County as planners. The report was prepared by Dr. Pitts, who was the County's Senior Planner of Community Development at the time. According to the County Staffs report, the subject property was studied by officials in the fire prevention, engineering, utilities, and environmental divisions. The fire prevention and engineering representatives recommended approval of the application with conditions, and the utilities representative **[**4]** recommended approval. The environmental planner did not recommend approval or denial but noted that the subject property was within a "Karst Sensitive Area."[fn2] Additionally, the report indicated that a "traffic analysis" had revealed that "adequate capacity exists on Halls River Road for anticipated traffic at the maximum development potential of the site." The report also noted that the subject property was within the CHHA and that it contained "significant wetland areas." According to the report, if the application was granted, Appellant would still need to "design a Master Plan of Development that minimizes wetland alterations."

One of the policies of the Plan that the report indicated may be cause for concern was Policy 3.18.11, which provides as follows:

The County shall protect springs by prohibiting increases in allowed land use intensity at the Generalized Future Land Use level within a Karst Sensitive Area without a hydrogeological analysis that addresses impacts to groundwater resources. The analysis shall be performed by a professional geologist or professional engineer licensed in Florida. Karst Sensitive Area shall be defined as an area in which limestone lies within five (5) feet of depth from natural grade.

In relation to this policy, the report stated that Appellant had "provided a letter from a professional engineer that adequately meets the intent of this policy" and that Appellant intended "to develop the site using methods that will meet the intent of the Comprehensive Plan." The report also contained the following observations:

This site has some severe environmental restrictions — extensive wetlands, proximity to an Outstanding Florida Water-body, Karst sensitive landscape — and it will be difficult to design a site that meets the standards of the Comprehensive Plan and the Land Development Code. The following policy would potentially restrict development if this application were to be approved:

Policy 3.16.3 Development shall not be allowed at the maximum densities and intensities of the underlying land use district if those densities would be harmful to natural resources.

So, the applicant should be cautioned that given the environmental sensitivity of the property, development may be limited on this site to less than the allowable maximum intensity. If this **[*25]** application is approved, an appropriately designed master plan of development will be required which meets all standards of the Comprehensive Plan and the Land Development Code and is approved by the Board of County Commissioners.

Ultimately, despite the environmental limitations, the County Staff concluded that the site was "appropriate for some type of RV Park development subject to an appropriately designed master plan." In making this recommendation, the County Staff emphasized that, "based on the environmental limitations of the area, the applicant is cautioned that the site may not be able to be designed at the maximum intensity for this land use district."

Dr. Pitts testified consistently **[**5]** with the County Staffs report. He noted that neither the Plan nor the Land Development Code ("LDC") prohibits RV parks in either karst sensitive areas or the CHHA. He explained, however, that the County has regulations limiting the density or intensity of RV parks in such areas and indicated that the professional studies he had received on the subject property represented that the site could be developed to meet those standards. Dr. Pitts testified that, in his opinion, "just about anything west of [U.S. Highway 19] is . . . karst sensitive." Dr. Pitts acknowledged that the subject property had 1.64 acres of wetlands and that there were wetlands in the surrounding areas. He explained that the Plan requires "setbacks" to mitigate wetland impacts and that the LDC required one-hundred percent protection of the wetlands. Additionally, he explained that the regulations required fifty percent open space in the Coastal Area. Based on these regulations, Dr. Pitts testified that it was highly unlikely that Appellant would be permitted to develop the space at the maximum build-out potential theoretically allowed under the new designation, which would be five units per acre. He emphasized that, no matter what the number of approved units proved to be, complete protection of the wetlands would be required. Finally, Dr. Pitts testified that there were several vested uses in the surrounding area, including a 300- to 400-unit RV park, that did not conform to the land use designations identified for those properties in the Plan.

Farnsworth, an environmental planner for the County, testified that the wetlands were located around the perimeter of the property and that they extended into the part of the property beyond the perimeter. She explained, however, that permitting standards for an RV park prohibited the filling of wetlands and that the subject property could be developed as an RV park without the need to fill in the wetlands.

After the hearing, the ALJ issued a Recommended Order concluding that the Amendment was inconsistent with FLUE Policy 17.2.7s requirement that future development be directed to "the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations." In support of this conclusion, the ALJ noted the County Staffs finding that the land had "severe environmental limitations." In particular, the ALJ noted that the area in which the subject property was located had extensive wetlands, a karst sensitive landscape, and a CHHA designation. The ALJ acknowledged that the Plan did not expressly prohibit RV parks in CHHA areas and that there were regulations in the Plan and the LDC that would limit the

intensity of development on this land even under the RVP designation. The ALJ concluded, however, that "[notwithstanding the other provisions within the Plan and LDRs that place limitations on RV park development **[*26]** in an effort to satisfy environmental constraints, . . . the subject property is clearly not `the most appropriate area, as depicted on the GFLUM' for new development, **[**6]** nor is it an area with `minimal environmental limitations.'"

The ALJ also concluded that the Amendment was inconsistent with FLUE Policy 17.2.8's requirement that development be accomplished in a "functional and compatible land use framework which reduces incompatible land uses." Because "compatible" is not defined in the Plan, the ALJ relied on the definition of "compatibility" in Florida Administrative Code Rule 9J-5.003(23). That definition is as follows:

"Compatibility" means a condition in which land uses or conditions can coexist in relative proximity to each other in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition.

In support of the conclusion that the new designation approved a land use incompatible with the surrounding uses, the ALJ noted Appellee's testimony concerning the characteristics of the area. He also noted Appellee's concerns about noise, lighting, litter, traffic, and property value. The ALJ further noted that there were only six nonconforming land uses and that each was permitted to exist due to vested rights. The ALJ then stated, "It is fair to infer that the insertion of an RV park in the middle of a large tract of vacant CL land would logically lead to further requests for reclassifying CL land to expand the new RV park or to allow other non-residential uses." The ALJ further found the following:

The commercial RV park, with a yet-to-be determined number of spaces for temporary RVs, tenants, and associated commercial development, will be in close proximity to a predominately [sic] residential neighborhood. A reasonable inference from the evidence is that these commercial uses will have a direct or indirect negative impact on the nearby residential properties and should not coexist in close proximity to one another.

Based on these findings and the determination that the Amendment was inconsistent with FLUE Policy 17.2.7, the ALJ recommended that the Commission conclude that the Amendment was not in compliance with the Act.

The Commission adopted the ALJ's findings and conclusions, except that it modified the finding that the Amendment would "logically lead to further requests for reclassifying CL land to expand the new RV park or to allow other non-residential uses." The Commission concluded that this finding was mere conjecture, unsupported by competent, substantial evidence. It modified the finding to read, "Unlike the presence of . . . pr-existing, non-conforming uses, permitting the addition of an RV park in the middle of a large tract of vacant CL land *now* would set a precedent that an RV park, a Commercial Land Use, is compatible with the Low Intensity Coastal and Lakes Land Use designation in this vicinity." Based on the adoption of the ALJ's findings and conclusions, as modified, the Commission held that the Amendment had no legal effect.

II. Analysis

A. Standard of Review

The amendment at issue in this case was adopted under the authority of section 163.3187(l)(c), Florida Statutes (2008). Section 163.3187(3)(a) provides for review **[**7]** of amendments adopted under section 163.3187(l)(c) under the following terms:

The state land planning agency shall not review or issue a notice of intent for small scale development amendments which satisfy the requirements of **[*27]** paragraph (1)(c). Any affected person may file a petition with the Division of Administrative Hearings pursuant to ss. *120.569* and *120.57* to request a hearing to challenge the compliance of a small scale development amendment with this act within 30 days following the local government's adoption of the amendment, shall serve a copy of the petition on the local government, and shall furnish a copy to the state land planning agency. An administrative law judge shall hold a hearing in the affected jurisdiction not less than 30 days nor more than 60 days following the filing of a petition and the assignment of an administrative law judge. The parties to a hearing held pursuant to this subsection shall be the petitioner, the local government, and any intervenor. In the proceeding, the local government's determination that the small scale development amendment is in compliance is presumed to be correct. The local government's determination shall be sustained unless it is shown by a preponderance of the evidence that the amendment is not in compliance with the requirements of this act. In any proceeding initiated pursuant to this subsection, the state land planning agency may intervene.

§ 163.3187(3)(a).

Because Appellant is challenging the Administration Commission's final agency action in this appeal, *see id.*, this Court's standard of review is governed by section 120.68(7), Florida Statutes (2010). That section provides in pertinent part as follows:

The court shall remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that:

. . . .

(b) The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing conducted pursuant to *ss. 120.569* and *120.57*; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact; [or]

. . . .

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action. . . .

§ 120.68(7).

In this Court, Appellant challenges the sufficiency of the evidence supporting the findings of inconsistency with both policies.[fn3] In addition, Appellant challenges the ALJ's interpretation of the policy requiring that future development be directed toward areas of the County with minimal environmental limitations. The separate arguments concerning each policy will be addressed in turn.

B. FLUE Policy 17.2.7

With regard to FLUE Policy 17.2.7, Appellant raises two arguments: first, that **[*28]** the ALJ erred in relying on the County Staffs finding of "severe environmental limitations" because the County Staff recommended approval of the application; and second, that the ALJ erred in failing to apply the FLUE policies that are more specific to RV parks in the Coastal Area in lieu of FLUE Policy 17.2.7, which **[**8]** is a general planning policy applicable to all land use decisions countywide. We agree with the second point.

i. The County Staffs Report

Appellant insists that the ALJ was required to give the County Staffs recommendation great weight. Even assuming that the County Staffs report was entitled to great weight in this case, there is no basis in the record for believing that the ALJ did not give it due consideration. To the contrary, the ALJ recited it heavily and relied on the concrete findings within it that showed the environmental limitations of the subject property, even though the ALJ disagreed with the ultimate conclusion. If an ALJ were not entitled to disagree, then the ALJ's review would serve no purpose. To the extent Appellant argues that the recommendation of the County Staff was not given sufficient weight, this assertion is unreviewable because "[i]t is not the role of the appellate court to reweigh evidence anew." *Young v. Dep't of Educ., Div. of Vocational Rehab.*, 943 So.2d 901, 902 (Fla. 1st DCA 2006). The ALJ's finding that the subject property had severe environmental limitations was thoroughly supported by the County Staffs report. Whether those limitations required a finding that the Amendment was inconsistent with FLUE Policy 17.2.7 is, however, a separate matter.

ii. Interpretation of the Plan

Appellant's argument that the ALJ erred in relying on a general policy in the Plan where more specific policies existed is an issue of law to be reviewed de novo. *See Nassau County v. Willis*, 41 So.3d 270, 278 (Fla. 1st

DCA 2010). In reviewing this issue de novo, however, we bear in mind that the ALJ was required under section 163.3187(3)(a) to presume that the County's determination that the Amendment complied with the Act (and, thus, was consistent with the Plan) was correct.

Rules of statutory construction are applicable to the interpretation of comprehensive plans. *See Great Outdoors Trading, Inc. v. City of High Springs*, 550 So.2d 483, 485 (Fla. 1st DCA 1989) (noting that the rules of statutory construction apply to municipal ordinances and city charters); *Willis*, 41 So.3d at 279 (noting that a comprehensive plan is like a "constitution for all future development within the governmental boundary") (citation omitted). Appellant argues that this case implicates the rules of construction that specific provisions control over general ones and that one provision should not be read in such a way that it renders another provision meaningless. Both rules are well-established. *See Murray v. Mariner Health*, 994 So.2d 1051, 1061 (Fla. 2008). Another rule of construction relevant to this issue is that all provisions on related subjects be read in pari materia and harmonized so that each is given effect. *Cone v. State, Dep't of Health*, 886 So.2d 1007, 1010 (Fla. 1st DCA 2004).

Here, the ALJ concluded that the Amendment conflicted with FLUE Policy 17.2.7, which provides, "The County shall guide future development to the most appropriate areas, as depicted on the GFLUM, specifically those with minimal environmental limitations and the availability of necessary services." (CP 10-155). Appellant contends that FLUE Policies 17.6.5 and 17.6.12, which are more specific to RV parks **[**9]** in the Coastal Area, indicate **[*29]** that the Amendment was consistent with the Plan. Those policies provide as follows:

Policy 17.6.5 Specialized commercial needs, such as water-dependent and water-related uses, temporary accommodations for tourists and campers, as well as neighborhood commercial uses and services serving residential communities within the general Coastal, Lakes, and Rivers Areas shall be provided for within the Future Land Use Plan and standards for development provided within the County LDC.

Policy 17.6.12 Recreational vehicle (RV) parks and campgrounds shall be designed according to a detailed master plan, shall preserve a minimum of 30 percent of the property in open space, shall provide a minimum of an additional 10 percent of the property as recreation areas, and generally shall conform to the commercial development standards in the Land Development Code In order to minimize the adverse impact of development on the resources and natural features of the Coastal, Lakes, and Rivers Region, the LDC shall be amended to include additional review criteria for all new RVP projects located in this region. Such criteria may include:

• Restrictions on density

• Enhanced open space requirements

• Wetland protection

• Upland preservation

• Clustering

• Connection to regional central water and sewer service

Appellant is correct in noting that the development of new RV parks in Coastal Areas was specifically anticipated by FLUE Policy 17.6.12. This observation does not, however, mandate approval of an RVP designation for the particular parcel at issue. Thus, it was appropriate for the AL J to resort to other portions of the Plan to determine whether approval of the RVP designation for the subject property was proper. The policy that most directly relates to this inquiry is FLUE Policy 17.2.7, which articulates the County's general preference for guiding future development to the "most appropriate areas," which are areas "with minimal environmental limitations."

Two additional provisions of the Plan provide more context for the policies at issue. First, the Plan describes the "Coastal Area" as follows:

The Coastal Area parallels the Gulf of Mexico, and the boundary may be described as following the west side of US-19 north from the Hernando County line to the Withlacoochee River. This boundary is the basis for an environmentally sensitive overlay zone to be used for land use regulatory purposes. . . .

Second, under the heading "Development in Wetland and Coastal Areas," the Plan notes the following:

Future development in the Coastal, Lake, and River Areas will require careful management in order to reduce potential problems and impacts on the environment. Development within these areas will be limited to low, [sic] intensity uses. In addition, all development will be required to meet standards for development and obtain necessary permits from appropriate regulatory agencies.

These two provisions show that, under the Plan, the entire Coastal Area is considered environmentally sensitive, and yet "[**[**10]** f]uture development" of this environmentally sensitive area is expected. Thus, when all the pertinent provisions of the Plan are considered in pari materia, the mere fact **[*30]** that an area has environmental limitations is not a basis to prohibit development as long as the development is carried out in accordance with the limitations provided by the Plan and the LDC. Therefore, the ALJ's finding of "severe environmental limitations" was insufficient to justify over-riding the County's determination that the Amendment was proper, particularly in light of the presumption required by section 163.3187(3)(a). The ALJ properly found the existence of wetlands and karst sensitivity in the area, but there was no competent, substantial evidence that these limitations were so severe as to require a prohibition on the development of an RV park under the restrictions that would be imposed by the LDC. In sum, when FLUE Policy 17.2.7 and the evidence related to that policy are viewed in the context of all relevant provisions of the Plan, the conclusion that the Amendment

is inconsistent with that policy is unsupported.

C. FLUE Policy 17.2.8

With regard to FLUE Policy 17.2.8, Appellant argues that the ALJ erred in relying on the testimony of Appellee and his neighbor as a basis for finding incompatibility of the subject property's new future land use designation with the surrounding uses. In particular, he argues that this testimony was "unacceptable lay testimony" and that no competent, substantial evidence showed a lack of compatibility, as that term is defined by Florida Administrative Code Rule 9J-5.003(23). We agree.

Initially, we note that the reliance on the definitions provided in Florida Administrative Code Rule 9J-5.003 was proper because the Plan does not define the term "compatible," and because section 163.3184(l)(b) defines "in compliance" in pertinent part as "consistent with the requirements of ss. 163.3177, 163.3178, 163.3180, 163.3191, and 163.3245, with the state comprehensive plan, with the appropriate strategic regional policy plan, and with chapter 9J-5, Florida Administrative Code." Therefore, to show that the Amendment provided for an incompatible land use, Appellee was required to prove that, because of the new future land use category assigned to Appellant's property, the land uses or conditions in the area could not "coexist . . . in a stable fashion over time such that no use or condition is unduly negatively impacted directly or indirectly by another use or condition." *See* Fla. R. Admin. Code 9J-5.003(23).

Lay witnesses may offer their views in land use cases about matters not requiring expert testimony. *Metro. Dade County v. Blumenthal*, 675 So.2d 598, 601 (Fla. 3d DCA 1995). For example, lay witnesses may testify about the natural beauty of an area because this is not an issue requiring expertise. *Blumenthal*, 675 So.2d at 601. Lay witnesses' speculation about potential "traffic problems, light and noise pollution," and general unfavorable impacts of a proposed land use are not, however, considered competent, substantial evidence. *Pollard v. Palm Beach County*, 560 So.2d 1358, 1359-60 (Fla. 4th DCA 1990). Similarly, lay witnesses' opinions that a proposed land use will devalue homes **[**11]** in the area are insufficient to support a finding that such devaluation will occur. *See City of Apopka v. Orange County*, 299 So.2d 657, 659-60 (Fla. 4th DCA 1974) (citation omitted). There must be evidence other than the lay witnesses' opinions to support such claims. *See BML Invs. v. City of Casselberry*, 476 So.2d 713, 715 (Fla. 5th DCA 1985); *City of Apopka*, 299 So.2d at 660.

Based on these standards, it was error for the ALJ to rely on Appellee's testimony concerning potential light pollution, increased traffic, and negative impacts on **[*31]** the value of the homes in the area. There were no facts to support his concerns, and in fact, the County Staffs report indicates that the traffic issue was studied by an expert and determined that increased traffic would not unduly burden the area.

Although it was proper for the ALJ to consider Appellee's observations that, with the exception of the vested non-conforming uses, the area is predominantly residential and that it is peaceful, Appellee presented no competent, substantial evidence to support his claim that the new RV park would unduly interfere with those characteristics of the area. The mere fact that Appellee's property has a different future land use designation

than Appellant's re-classified property is insufficient. *See Hillsborough County v. Westshore Realty, Inc.,* AAA So.2d 25, 27 (Fla. 2d DCA 1983) (holding that the mere fact that property is in close proximity to another property with a less restrictive classification does not require reclassification). Additionally, while it may have been noteworthy that Appellant presently fails to maintain its vested one-acre RV park in an attractive manner, the concern that the yet-to-be-developed RV park would be maintained in the same way is speculative and does not establish long-term negative impacts stemming from the reclassification of the subject property.

In sum, based on the applicable definition of "compatibility," Appellant's argument that there was insufficient evidence to support a finding that the RV park was incompatible is well-taken. It appears that, in finding the proposed use incompatible with the surrounding uses, the ALJ gave undue emphasis to Appellee's preference not to have an RV park as a neighbor. However, this preference in itself is insufficient to override Appellant's desire to build an RV park on its land. *See Conetta v. City of Sarasota*, 400 So.2d 1051, 1053 (Fla. 2d DCA 1981) (suggesting that a land-use decision should not be "based primarily on the sentiments of other residents"). As a result, we hold that the ALJ erred in concluding that the Amendment was inconsistent with FLUE Policy 17.2.8.

III. Conclusion

For the reasons explained above, both of the ALJ's ultimate conclusions as to inconsistency of the Amendment with the remaining portions of the Plan were erroneous. As a result, we reverse and remand to the Commission for reinstatement of the ordinance approving the Amendment.

REVERSED and REMANDED.

WEBSTER and MARSTILLER, JJ., Concur.

[fn1] As provided in the Plan, the CLC category allows commercial uses that are "water related, water dependent, or necessary for the support of the immediate population," i.e. "neighborhood commercial uses, personal services, or professional services." This category is intended "for a single business entity on a single parcel of property."

[fn2] According to Dr. Pitts, karst is a "limestone underground sort of rock structure that is very porous" and through which "pollutants can very easily travel."

[fn3] In challenging the sufficiency of the evidence, Appellant argues that the ALJ did not view the evidence with an eye toward the proper standard. He contends the ALT should have considered whether the County's determination that the Amendment was proper was "fairly debatable," based on the standard recognized in *Coastal Development of North Florida, Inc. v. City of Jacksonville Beach*, 788 So.2d 204 (Fla. 2001). The argument that the ALJ applied the wrong standard is not properly before us because Appellant stood silent

when Appellee argued to the ALT that the "fairly debatable" standard did not apply and when the ALT invited Appellant to provide contrary authority. *See Dep't of Bus. & Prof l. Regulation, Constr. Indus. Licensing Bd. v. Harden*, 10 So.3d 647, 649 (Fla. 1st DCA 2009) (recognizing the preservation rule in administrative proceedings).

Pagination

* So. 2d

Majority Opinion > Dissenting Opinion > Table of Cases

District Court of Appeal of Florida
Fourth District

Patricia Pollard, Petitioner,
v.
Palm Beach County, a political subdivision of the State of Florida, Respondent.

No. 88-1827.

May 9, 1990

Bruce G. Kaleita, West Palm Beach, for petitioner.

Richard W. Carlson, Jr. and Thomas P. Callan, Asst. County Attys., West Palm Beach, for respondent.

[*1359] PER CURIAM.

This is a petition to review denial of an application for a special exception. The real property in question is located in an area zoned residential. The use for which a special exception was requested is an adult congregate living facility for the elderly, a use permitted by special exception in a residential area.

Certain procedural shortcomings having been remedied, we now treat only the merits, being satisfied that this court has jurisdiction.

After making appropriate application, petitioner obtained approval of the County Zoning Department and, subsequently, the approval of the County Planning Commission. Approval was based upon documentary evidence and expert opinion.

In public hearings before the County Commission, various neighbors expressed their opinion that the proposed use would cause traffic problems, light and noise pollution and generally would impact unfavorably on the area. The County Commission denied the application and the circuit court denied certiorari to review that denial. We grant the writ and quash the order under review.

We explained the respective burdens of an applicant for a special exception and the zoning authority in *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478, 480 (Fla. 4th DCA 1975), as follows:

> In rezoning, the burden is upon the *applicant* to clearly establish such right (as hereinabove indicated).

> In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the *zoning authority* to demonstrate by competent substantial evidence that the special exception *is adverse to the public interest*. Yokley on Zoning, vol. 2, p. 124. A special exception is a permitted use to which the applicant is entitled *unless* the zoning authority determines according to the standards of the zoning ordinance that such use would adversely affect the public interest.

(Emphasis in original; some citations omitted.)

The supreme court, in *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957), explained in the following language what is meant by the term "competent substantial evidence" in the context of certiorari review:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.
>
> We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry*, 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to **[*1360]** sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

(Some citations omitted.)

In *City of Apopka v. Orange County*, 299 So.2d 657, 660 (Fla. 4th DCA 1974), the "evidence" in opposition to petitioner's application for special exception consisted, as in the present case, of the opinions of neighbors, and in that case we explained:

> The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts.
>
> Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for.

Earlier in that opinion we also noted:

> As pointed out by Professor Anderson in Volume 3 of his work, American Law Of Zoning, 15.27, pp. 155-56:
>
> > "It does not follow, ... that either the legislative or the quasi-judicial functions of zoning should be controlled or unduly influenced by opinions and desires expressed by interested persons at public hearings.
> >
> > Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:
> >
> > 'Public notice of the hearing of an application for exception ... is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of ... public health....
> >
> > The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application.'
> >
> > The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect."

299 So.2d at 659.

Our review of the record leads us to conclude that there is literally no competent substantial evidence to support the conclusion reached below. The circuit court overlooked the law which says that a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards of the zoning ordinance that the use would adversely affect the public interest. *Rural New Town*, 315 So.2d at 480. It also overlooked the law which says that opinions of residents are not factual evidence and not a sound basis for denial of a zoning change application. *See City of Apopka*, 299 So.2d at 660.

For these reasons we grant certiorari, quash the order and remand with instructions that the special exception be granted.

HERSEY, C.J., and ANSTEAD, J., concur.

STONE, J., dissents with opinion.

[*1361] STONE, Judge, dissenting.

I would deny certiorari. In my judgment, the record supports the decision of the circuit court upholding the action of the county. I also do not conclude that the trial court overlooked the law.

Table of Cases

Rural New Town, Inc. v. Palm Beach County
, 315 So.2d 478, 480 (Fla. 4th DCA 1975)
De Groot v. Sheffield
, 95 So.2d 912, 916 (Fla.1957)
Becker v. Merrill, 155 Fla. 379, 20 So.2d 912
Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748
Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521
City of Apopka v. Orange County
, 299 So.2d 657, 660 (Fla. 4th DCA 1974)

Online Reference: FLWSUPP 2407FRIG

Municipal corporations -- Development orders -- Appeals -- Certiorari -- Standing -- Petitioners who objected to size of proposed development, visual obstruction, and planned neon sign lacked standing to pursue certiorari relief from order approving development where they failed to demonstrate how negative impact of project on them differed in kind from negative impact on community as a whole

ANTONIO FRIGULS, STUART RICH, & IRA SILVER, Petitioners, v. THE CITY OF CORAL GABLES, NP INTERNAIONAL USA, LLC, & CORAL PARK INN,LLC, Respomdents. Circuit Court, 11th Judicial Circuit (Appellate) in and for Miami-Dade County. Case No. 16-091 AP. Ordinance No. 2015-38. Resolution No. 2015-316. October 18, 2016. On certiorari review from an ordinance and resolution rendered by the City Commission for Coral Gables, Counsel: W. Tucker Gibbs, from W. Tucker Gibbs, P.A., for the Petitioners. Frances G. De La Guardia from Holland & Knight, LLP and Craig H. Coller from Craig H. Coller, P.A. for the City of Coral Gables. Jeffrey S. Bass and Katherine R. Maxwell from Shubin & Bass, P.A. for NP International USA, LLC and Coral Park Inn, LLC.

(Before BAILEY, HENDON, & THORNTON, Judges.)

(PER CURIAM.) NP International USA, LLC ("Applicant") filed a development application with the Coral Gables Planning and Zoning Board. Antonio Friguls, Stuart Rich, and Ira Silver ("Petitioners") live within 1,000 feet of the proposed project and oppose the application. Despite the opposition from Petitioners and others, the Coral Gables Commission ("city commission" or "commission") approved the development application subject to conditions and inscribed its decision into Ordinance No. 2015-38 and Resolution No. 2015-316. The Petitioners request that we quash the Ordinance and Resolution.

The City of Coral Gables ("City") argues that the Petitioners lack standing because they assert "generalized complaints about protecting" Coral Gables, such as the project is oversized, the project will affect Coral Gables' unique look, and the project's height will impact the view from the park. The Applicant[1] asserts that the Petitioners fail to demonstrate any injury, which "differs in kind from the impact to the community as a whole."

We must resolve standing as a "threshold issue" before deciding the merits. *Solares v. City of Miami,* 166 So. 3d 887, 888 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a]. An aggrieved person "having standing to sue is a person who has a legally recognizable interest which is or will be affected by" the zoning action. *Renard v. Dade County,* 261 So. 2d 832, 837 (Fla. 1972). "An individual having standing must have a definite interest exceeding the general interest in community good share in common with all citizens." *Id.* Even when "a person has sufficient standing to challenge" a zoning decision, the litigant must still prove that the zoning authority's decision "was not fairly debatable." *Id.* (footnote removed).

The Petitioners contend that they "are aggrieved parties pursuant to" section 3-607, Zoning Code, and that they possess legally cognizable interests impacted by the zoning decision.[2] According to the Coral Gables Zoning Code: "An action to review any decision of the City Commission under these regulations may be taken by *any person or persons,* jointly or separately, *aggrieved by such decision* by presenting" a certiorari petition to the circuit court. § 3-607(A), Zoning Code (2016). Although section 3-607(A) confers standing upon any aggrieved "persons" to challenge a zoning decision, the Florida Supreme Court articulated factors regarding the special injury necessary for standing in a zoning case: "the proximity of his [or her] property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations." *Renard,* 261 So. 2d at 837.[3] Although the instant Petitioners received notice regarding the hearing because they live within a 1,000 foot distance from the project, (Pet. Reply App. Tab A), "notice requirements are not controlling on the question of who has standing." *Renard,* 261 So. 2d at 837. Though Florida law distinguishes standing under *Renard* from section 163.3215, Florida Statutes, standing, *City of Ft. Myers v. Splitt,* 988 So. 2d 28, 32 (Fla. 2d DCA 2008) [33 Fla. L. Weekly D1673a], section 163.3215 cases provide examples as to interests conferring standing. *Pichette v. City*

of N. Miami, 642 So. 2d 1165, 1166 (Fla. 3d DCA 1994). When analyzing a petitioner's standing to pursue certiorari relief, we determine standing based upon the evidence received by the administrative tribunal, not the allegations in the petition. *Splitt,* 988 So. 2d at 32.

On September 16, 2015, Petitioner Rich attended a zoning board hearing and spoke about the project's "visual obstruction" impacting visitors to Jaycee Park and suggested that the City should authorize "a building in reasonable proportion to the area" as opposed to a "grossly oversized project" (Pet. App., Tab 14 at 32-33). Petitioner Rich also spoke at the October 12, 2015 commission hearing during which he stated that a tree would hide the project's upper floors, park visitors currently can see "the Holiday Inn [near or at the site of the project]" from the park, and that the project "is not low density and low volume." *Id.* at 287-289. During the December 8, 2015 commission hearing, he challenged the project supporters' credibility. *Id.* at Tab 46 at 154. Although he did not clarify whether he complained about a neon sign on a "UM building" or a future sign on the project, Petitioner Rich complained about a "neon sign. . .on from dusk to dawn." *Id.* at 154-155.[4] Based upon Petitioner Rich's comments at the zoning board and the commission hearings, we find that he did not demonstrate how this project will impact him more negatively than the impact upon the general community. Thus, he does not possess standing. *Messett v. Cohen,* 741 So. 2d 619, 622 (Fla. 5th DCA 1999) [24 Fla. L. Weekly D2222a]; *Kagan v. West,* 677 So. 2d 905, 907 (Fla. 4th DCA 1996) [21 Fla. L. Weekly D1557b].

On October 22, 2015, Petitioner Friguls spoke at a commission hearing and stated that the project "is three times the size permitted by the current zoning" (Pet. App., Tab 28 at 233-234). Petitioner Friguls stated that the "Zoning Code does not permit the project as presented" and commented upon the code's historic impact upon Coral Gables' appearance. *Id.* at 234-235. Case law provides guidance here. A district court considered a case where the appellants alleged that a cabana violated an easement and building height restrictions, limited the challengers' ability to walk to a canal, and blocked their river view. *Kagan,* 677 So. 2d at 906-907. The district court stated that the appellants, "who share the private road" with the appellees, had "standing to enforce the building code." *Id.* at 908. Unlike *Kagan,* Petitioner Friguls did not assert any easement, covenant, or other property interest impacted by this project. Therefore, we hold that he lacks standing since he did not demonstrate how the project will impact him more negatively than the impact upon the general community.

On December 8, 2015, the commission conducted a hearing at which Petitioner Silver stated he would bring future political opposition against the current commissioners (Pet. App., Tab 8 at 125). Petitioner Silver did not articulate any noise impact, traffic impact, or land value diminution, *Pichette,* 642 So. 2d at 1166, thus failing to demonstrate how the project will impact him more negatively than the general community.

Because the Petitioners lack standing, we "dispense with oral argument," Fla. R. App. P. 9.320, scheduled for November 9, 2016 and dismiss this certiorari petition. *Penabad v. A.G. Gladstone Assocs., Inc.,* 823 So. 2d 146, 147 (Fla. 3d DCA 2002) [27 Fla. L. Weekly D1373d].

PETITION DISMISSED.

---

[1]Coral Park Inn, LLC also joined NP International USA, LLC's response to the Petition. We refer to them collectively as the "Applicant."

[2]The Petitioners also argue that section 3-603, Zoning Code, "acknowledges that aggrieved individuals" who "have a right to mail notice have an interest in the noticed zoning matter that is different, distinct and greater than the members of the community at large" who "receive no such notice." We interpret section 3-603 as authorizing a litigant's standing to present a negative concurrency issue *to the city commission.* Section 3-603 does not authorize a party's standing to challenge an ordinance in a circuit court. We find the Petitioners' section 3-603 argument unpersuasive.

[3]Regarding municipal legislation's influence upon the special injury factor, a district court held that a circuit appellate court "incorrectly ruled" that a county commission lacked standing to pursue certiorari relief and

reasoned that zoning *regulations* "gave the Commission and any officer or department of the county the right to seek certiorari review of Zoning Board actions in the circuit court, regardless of whether the entity seeking review appeared in the proceeding before the Zoning Board, *without the necessity for showing of special injury or aggrievement.*" *Bd. of County Com'rs of Sarasota County v. Bd. of Zoning Appeal of Sarasota County,* 761 So. 2d 1217, 1218 (Fla. 2d DCA 2000) [25 Fla. L. Weekly D1585a] (emphasis added). *But cf. Solares v. City of Miami,* 166 So. 3d 887, 889 (Fla. 3d DCA 2015) [40 Fla. L. Weekly D1253a] (a "city charter *cannot expand or contract the principle of standing* which ultimately sounds in the express separation of powers provision of Article II, Section 3 of the Florida Constitution") (emphasis added). Although the second district implies that municipal legislation alone may confer standing without requiring a petitioner to demonstrate a special injury, *Renard* controls this case since the Petitioners do not pursue relief as municipal officers.

[4]In the Ordinance, the commission directed that "No signs or building lights shall be permitted above the third floor along" Madruga Avenue (Pet. App., Tab 1 at 6).

* * *

Supreme Court of Florida

Grace Renard, Petitioner,
v.
Dade County, a political subdivision of the State of Florida, et al., Respondents.

No. 41388.

April 19, 1972

Eugene P. Spellman, of Law Offices of Eugene P. Spellman, Miami, for petitioner.

Stuart Simon, County Atty., and St. Julien P. Rosemond, Asst. County Atty., and Paul Siegel, of Sinclair, Louis, Sand & Siegel, Miami, for respondents.

[*833] BOYD, Justice.

This cause is before us on petition for writ of certiorari to review the decision of the District Court of Appeal, Third District, reported at 249 So.2d 500. Jurisdiction is based on the certification of the District Court under Article V, *§ 4(2)* of the Florida Constitution, F.S.A., **[*834]** that the decision sought to be reviewed passes upon a question of great public interest, to-wit:

> "The standing necessary for a plaintiff to (1) enforce a valid zoning ordinance; (2) attack a validly enacted zoning ordinance as not being fairly debatable and therefore an arbitrary and unreasonable exercise of legislative power; and (3) attack a void ordinance, i. e., one enacted without proper notice required under the enabling statute or authority creating the zoning power."

Petitioner Renard and respondents Richter, owned certain adjoining properties in the unincorporated area of Dade County zoned IU-2, industrial. The Richters applied for a rezoning of their parcel. The Board of County Commissioners ultimately permitted a rezoning from IU-2 to multiple family residence with certain exceptions relative to a nine-hole golf course and a variance for private, in lieu of public, roads. This was in accordance with the recommendations of the planning board as approved by the zoning appeals board of the county.

Petitioner was an objector in the zoning proceedings held before the Dade County Zoning Appeals Board and an objector before the Board of County Commissioners. Following adverse rulings by the appeals board and County Commission, petitioner sought certiorari before the Circuit Court pursuant to applicable county ordinances.[1]

The Circuit Court ruled that petitioner, not having alleged a special interest, had no standing to prosecute the matter in the Circuit Court and, even if she had standing, the record adequately demonstrated that the issue was fairly debatable and petitioner would not have been entitled to the relief sought.

On appeal, the District Court held that petitioner had sufficient standing to institute suit in the trial court but, that the rezoning in question was fairly debatable and therefore within the legislative discretion of the Board of County Commissioners. The District Court affirmed the judgment of the trial court but certified its decision as one passing on a question of great public interest.

The decision of the District Court on the question certified is as follows:[2]

> "First, as indicated above, the appellant as an abutting property owner to the property rezoned would, in fact, suffer a special damage by virtue of the increased setback restriction different in kind from the community generally; and this would meet the test of special damage. But, even without meeting this test, we hold that these cases would not be applicable to a property owner within the area wherein actual notice was required to be sent to him prior to any rezoning hearing. Anything to the contrary said in *S. A. Lynch Investment Corporation v. City of Miami*, *supra*, is hereby specifically receded from. We further note that there is a distinction in the cases relied on by the County when there is a proceeding in which a plaintiff seeks to enforce an existing zoning ordinance, such as a violation of a setback requirement, special damage is necessary, and no special damage is necessary when a plaintiff seeks to **[*835]** have an act of a zoning authority declared void or is within the immediate area to be affected. *Hartnett v. Austin*, Fla.1956, 93 So.2d 86; *Josephson v. Autrey*, Fla.1957, 96 So.2d 784. *In other words, we hold special damage must be shown when a taxpayer or property owner seeks to enjoin the violation of an existing ordinance* [i. e. *Boucher v. Novotny*, Fla.1958, 102 So.2d 132; *Conrad v. Jackson*, Fla.1958, 107 So.2d 369], *but need not be shown if the taxpayer or property owner is within the affected range of the property which requires actual notice before the rezoning made may be considered by the legislative body* [*Hartnett v. Austin*, supra; *Elwyn v. City of Miami*, Fla.App.1959, 113 So.2d 849; *Friedland v. City of Hollywood*, Fla.App.1961, 130 So.2d 306; Vol. 3, American Law of Zoning, Anderson, *§ 21.05*, p. 558], *or when he seeks to review an alleged void act*. *Hartnett v. Austin*, supra; *Josephson v. Autrey*, supra; *Rhodes v. City of Homestead*, Fla.App.1971, 248 So.2d 674 (opinion filed May 25, 1971). Therefore, we find that in the instant case the appellant had the standing to institute the suit in the trial court." (Emphasis supplied.)

In the years following this Court's decision in *Boucher v. Novotny*,[3] a split has developed between the various District Courts on the issue of standing to sue in zoning matters. The *Boucher* case was a suit to enjoin the violation of the setback requirements of a municipal zoning ordinance. The Bouchers sought to obtain mandatory injunctive relief to compel the Novotnys to remove allegedly illegal encroachments constructed on their motel. The City had approved the building plans for the Novotny's motel which included the complained of encroachment. The properties of the parties located in the City of Clearwater, were separated by a sixty-foot wide street. The Bouchers attempted to allege special damages by reason of proximity and by reason of being within the zoning area subject to the same setback requirements as the Novotny's property. This Court held, however, that the Bouchers did not have sufficient standing to sue and stated the following rule:[4]

> "We, therefore, align ourselves with the authorities which hold that one seeking redress, either preventive or corrective, against an *alleged violation of a municipal zoning ordinance* must allege and prove special damages peculiar to himself differing in kind as distinguished from damages differing in degree suffered by the community as a whole."
>
> (Emphasis supplied.)

The "special damage" rule of the *Boucher* case is an outgrowth of the law of public nuisance.[5] Zoning violations have historically been treated as public nuisances not subject to suit by an individual unless that individual has suffered damages different in kind and degree from the rest of the community. The *Boucher* rule was not intended to be applied to zoning matters other than suits by individuals for zoning violations.[6]

The general rule regarding standing to contest the action of a zoning authority was **[*836]** stated by this Court in *Josephson v. Autrey*:[7]

> "We have on numerous occasions held that persons adversely affected by zoning ordinances or the action of zoning agencies have a status as parties sufficient to entitle them to proceed in court to seek relief."

To like effect is this Court's decision in *Hartnett v. Austin*.[8]

In *Wags Transportation System v. City of Miami Beach*,[9] this Court held that homeowners in a zoning district would be permitted to intervene in an appeal from a decree breaking zoning restrictions and commercializing the area where their homes were located.

The District Court of Appeal, Third District, in *Elwyn v. City of Miami*,[10] held that abutting homeowners were entitled to maintain a suit challenging an ordinance granting a variance for a gasoline service station. On petition for rehearing, the *Boucher* case was raised by the zoning authority and distinguished by the District Court as follows:

> "That case [Boucher] was not applicable here because of material difference in the factual situations presented in the two cases.
>
> * * * * * *
>
> "The instant case was not one dealing with the violation of a zoning ordinance, but one which challenged the validity of an amendatory zoning ordinance, which, by granting a variance amounting to spot zoning, permitted appellees to put their property to a liberal business use (gasoline service station), prohibited in the more restricted R-3 classification for which the area involved was zoned. The right of an adjacent or nearby home owner directly affected by an alleged improper intrusion of such liberal business to challenge the validity thereof, is recognized."

A similar case is that of *Friedland v. Hollywood*,[11] wherein the District Court of **[*837]** Appeal, Second District, held void an ordinance which would have allowed the variance for the construction of a service station in the vicinity of property owned by the plaintiffs.

Some of the foregoing cases attacking the validity of zoning ordinances came to the Circuit Court as petitions for writ of certiorari to review actions of the zoning board of adjustment under Florida Statutes Chapter *176, F.S.*A.; others originated in the Circuit Court. On the question of standing to sue there is no basis for distinguishing between cases reaching the courts after appeal to a zoning board, in areas where such boards exist, and those cases originating in the court system.[12] Florida Statutes *§ 176.11*, F.S.A., provides for appeals to the zoning board of adjustment by "any person aggrieved." Florida Statutes *§ 176.16*, F.S.A., provides that "any person aggrieved" by the decision of the zoning board of adjustment may petition the Circuit Court for writ of certiorari.

An aggrieved or adversely affected person having standing to sue is a person who has a legally recognizable interest which is or will be affected by the action of the zoning authority in question. The interest may be one shared in common with a number of other members of the community as where an entire neighborhood is affected, but not every resident and property owner of a municipality can, as a general rule, claim such an interest. An individual having standing must have a definite interest exceeding the general interest in community good share in common with all citizens. So-called "spite suits" will not be tolerated in this area of the law any more than in any other.

In determining the sufficiency of the parties' interest to give standing, factors such as the proximity of his property to the property to be zoned or rezoned, the character of the neighborhood, including the existence of common restrictive covenants and set-back requirements, and the type of change proposed are considerations. The fact that a person is among those entitled to receive notice under the zoning ordinance is a factor to be considered on the question of standing to challenge the proposed zoning action. However, since the notice requirements of the many zoning laws throughout the State vary greatly, notice requirements are not controlling on the question of who has standing. Persons having sufficient interest to challenge a zoning ordinance may, or may not, be entitled to receive notice of the proposed action under the zoning ordinances of the community.

It is to be remembered that even though a person has sufficient standing to challenge the action of the zoning authority, he must still carry the burden of proving that the challenged action of the zoning authority was not fairly debatable.[13]

The question certified to this Court, set out *supra*, has three parts. Part (1) deals with standing to enforce a valid zoning ordinance. The *Boucher* rule requiring special damages still covers this type of suit. However, in the twenty years since the *Boucher* decision, changed conditions, including increased population growth and **[*838]** density, require a more lenient application of that rule. The facts of the *Boucher* case, if presented today, would probably be sufficient to show special damage.

Part (2) of the question certified to this Court deals with standing to attack a validly enacted zoning ordinance as being an unreasonable exercise of legislative power. As indicated above, persons having a legally recognizable interest, which is adversely affected by the proposed zoning action, have standing to sue.

Part (3) of the question certified deals with standing to attack a zoning ordinance which is void because not properly enacted, as where required notice was not given. Any affected resident, citizen or property owner of the governmental unit in question has standing to challenge such an ordinance.[14]

The District Court found that petitioner Renard had sufficient standing to attack the rezoning here in question, but, on review of the record, determined that the rezoning was "fairly debatable" and so was a valid exercise of power by the zoning authority. We agree.

Accordingly, and for the foregoing reasons, the decision of the District Court of Appeal is affirmed.

It is so ordered.

ROBERTS, C. J., and ERVIN, CARLTON and McCAIN, JJ., concur.

*fn*1.

> Metropolitan Code of Dade County, *§ 33-316*: "No *person aggrieved* by any zoning resoluton, order, requirement, decision or determination of an administration official or by any decision of the zoning appeals board may apply to the Court for relief unless he has first exhausted the remedies provided for herein and taken all available steps provided in this article . . . it is intended and suggested that such decision may be reviewed by the filing of a petition for writ of certiorari in the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, Florida, in accordance with the procedures and within the time provided by the Florida Appellate Rules for the review of the rulings of any commission or board; and such time shall commence to run from the date of the decision sought to be reviewed." (Emphasis supplied.)

*fn*2. *Renard v. Dade County*, 249 So.2d 500, 502 (Fla.App.3rd 1971).

*fn*3. 102 So.2d 132 (Fla.1958).

*fn*4. Id. at 135.

*fn*5. *Boucher v. Novotny*, 102 So.2d 132, 135 (Fla.1958); *North Dade Bar Assoc. v. Dade-Commonwealth Title Ins.*, 143 So.2d 201, 205 (Fla.App.3rd 1962):

> "'* * *
>
> A public nuisance is an offense against the State, and as such is subject to abatement or indictment on the motion of the proper governmental agency. * * *
>
> "'* * * An individual cannot maintain an action for a public nuisance as such. But when an individual suffers special damage from a public nuisance, he may maintain an action.'
>
> "This rule has been applied in Florida to suits to enjoin a zoning violation. *Boucher v. Novotny*, Fla.1958, 102 So.2d 132."

fn6. *Boucher* has been subject to criticism even as applied to zoning violations: 12 Univ.Fla.L.Rev., Third Parties in Zoning, 16, 23, 40 (1959).

fn7. 96 So.2d 784, 787 (Fla.1957).

fn8. 93 So.2d 86, 90 (Fla.1956): "We encounter no difficulty in concluding that the appellees were entitled to bring the suit. They occupied their homes immediately across the street from the proposed parking area. They relied on the existing zoning conditions when they bought their homes. They had a right to a continuation of those conditions in the absence of a showing that the change requisite to an amendment had taken place. They allege that the contemplated change would damage them and that it was contrary to the general welfare and totally unjustified by existing conditions. This gave them a status as parties entitled to come into court to seek relief. True their rights were subject to the power of the city to amend the ordinance on the basis of a proper showing. Nonetheless, they have a right to insist that the showing be made."

See also, 35 Fla.Jur., Zoning Laws, *§ 30*: "Persons adversely affected by zoning ordinances or the action of zoning agencies have a status as parties sufficient to entitle them to proceed in court to seek relief."

fn9. 88 So.2d 751, 752 (Fla.1956): "The petition for leave to intervene alleges that petitioners are within the same zoning district as the property described in the complaints in the consolidated causes, that the decree destroys the value of their property because petitioners have homes on said property which they use for residential purposes, therefore the decree of the lower court breaking these zoning restrictions and commercializing the district renders their property less suitable for residential purposes. Petitioners' property was purchased on the strength of the zoning ordinance and in reliance upon the fact that all property within the zoning district would be maintained as residential property. * * *

* * * * *

"We think the petition to intervene showed such an interest in the res that the ends of justice require that it be granted. * * * Nothing is more sacred to one than his home and the petitioners should have been permitted to come in and bring their rights in this to the attention of the court."

fn10. 113 So.2d 849 (Fla.App.3rd); cert. denied 116 So.2d 773, (Fla.1959).

fn11. 130 So.2d 306 (Fla.App.2d 1961).

fn12. 2 Rathkopf, Zoning and Planning, 36-1 (1971): "Generally, any person who can show that the existence or enforcement of a zoning restriction adversely affects, or will adversely affect, a property interest vested in him or that the grant of a permit to another or rezoning of another's land will similarly affect him, has the requisite justiciable interest in the controversy, and is a proper party plaintiff. *In this aspect, the right of a litigant to sue for declaratory judgment or for an injunction is based upon the same criteria as are determinative of the status of a petitioner as a 'party aggrieved' to bring certiorari to review the determination of a board of appeals or adjustment. The difference, if any, relates only to the forum and form of the remedy.*" (Emphasis supplied.)

fn13. *City of Miami v. Hollis*, 77 So.2d 834 (Fla.1959); *City of Jacksonville v. Imler*, 235 So.2d 526 (Fla.App.1st 1970).

[fn]14. See e. g., *Rhodes v. City of Homestead*, 248 So.2d 674 (Fla.App.3rd 1971); *Knowles v. Town of Kenneth City*, 247 So.2d 748 (Fla.App.2d 1971).

Table of Cases

Hartnett v. Austin, Fla.1956, 93 So.2d 86

Josephson v. Autrey, Fla.1957, 96 So.2d 784

Boucher v. Novotny, Fla.1958, 102 So.2d 132

Conrad v. Jackson, Fla.1958, 107 So.2d 369

Elwyn v. City of Miami, Fla.App.1959, 113 So.2d 849

Friedland v. City of Hollywood, Fla.App.1961, 130 So.2d 306

Rhodes v. City of Homestead, Fla.App.1971, 248 So.2d 674 (opinion filed May 25, 1971)

Renard v. Dade County, 249 So.2d 500, 502 (Fla.App.3rd 1971)

Boucher v. Novotny, 102 So.2d 132, 135 (Fla.1958)

North Dade Bar Assoc. v. Dade-Commonwealth Title Ins., 143 So.2d 201, 205 (Fla.App.3rd 1962)

Boucher v. Novotny, Fla.1958, 102 So.2d 132

City of Miami v. Hollis, 77 So.2d 834 (Fla.1959)

City of Jacksonville v. Imler, 235 So.2d 526 (Fla.App.1st 1970)

Rhodes v. City of Homestead, 248 So.2d 674 (Fla.App.3rd 1971)

Knowles v. Town of Kenneth City, 247 So.2d 748 (Fla.App.2d 1971)

Section 15-104. Quasi-judicial procedures.

A. Purpose and applicability. The provisions of this Section apply to all quasi-judicial hearings held pursuant to these regulations.

B. Order of presentation. Quasi-judicial hearings shall be conducted generally in accordance with the following order of presentation:

1. Disclosure of ex parte communications and personal investigations.
2. Presentation by City Staff.
3. Presentation by the applicant.
4. Public comment in favor of the application.
5. Public comment in opposition to the application.
6. Cross-examination by City Staff.
7. Cross-examination by applicant.
8. Cross-examination by decision-making body.
9. Motion by decision-making body with explanation of positions of negative or denial.
10. Discussion among members of decision-making body.
11. Action by decision-making body and entry of specific findings.

C. Submission of evidence. Copies of all documentary evidence and written summaries of expert testimony to be presented in a quasi-judicial proceeding shall be submitted to the City Clerk at least five (5) days prior to the date of any hearing. In the event that documentary evidence is proffered at a public hearing which was not submitted to the City Clerk in accordance with this subsection, the body conducting the quasi-judicial proceeding shall, at the request of the City Manager or other party, grant a reasonable continuance to allow for an opportunity to review and respond to the evidence which was not submitted to the City Clerk as required in this subsection.

City of Coral Gables
Planning and Zoning Staff Report

Property:	**Ponce Park Residences** **3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga**
Applicant:	RC Acquisitions, LLC and P&J Enterprise Holdings, LLC
Application:	Abandonment and Vacation of an Alley, Comprehensive Plan Map Amendment, Receipt of Transfer of Development Rights (TDRs), Conditional Use Review for Mixed-Use Site Plan, and Tentative Plat
Public Hearing:	Planning and Zoning Board / Local Planning Agency
Date & Time:	**June 8, 2022; 6:00 – 9:00 p.m.**
Location:	City Commission Chambers, City Hall, 405 Biltmore Way, Coral Gables, Florida 33134

1. APPLICATION REQUEST

Application request is for Abandonment and Vacation of an Alley, Comprehensive Plan Map Amendment, Receipt of Transfer of Development Rights (TDRs), Conditional Use review for a Mixed-Use Site Plan, and Tentative Plat for a mixed-use project referred to as "Ponce Park Residences."

The requests require three public hearings, including review and recommendation by the Planning and Zoning Board, and 1st and 2nd Reading before the City Commission. The Ordinances and Resolutions under consideration include the following:

1. *An Ordinance of the City Commission of Coral Gables, Florida, approving the vacation of a public alleyway pursuant to Zoning Code Article 14, "Process," Section 14-211, "Abandonment and Vacations" and City Code Chapter 62, Article 8, "Vacation, Abandonment and Closure of Streets, Easements and Alleys by Private Owners and the City; Application Process," providing for the vacation of the twenty (20) foot wide alley which is approximately one hundred and fifty-five (155) feet in length lying between Lots 12 thru 18 and Lots 11 and 19 in Block 29, Crafts Section (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*
2. *An Ordinance of the City Commission of Coral Gables, Florida amending the Future Land Use Map of the City of Coral Gables Comprehensive Plan pursuant to Zoning Code Article 14, "Process," Section 14-213, "Comprehensive Plan Text and Map Amendments," and Small Scale amendment procedures (ss. 163.3187, Florida Statutes), from "Commercial Low-Rise Intensity" to "Commercial High-Rise Intensity" for Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29, (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE) (LPA review)*

3. *A Resolution of the City Commission of Coral Gables, Florida approving receipt of Transfer of Development Rights (TDRs) pursuant to Zoning Code Article 14, "Process," Section 14-204.6, "Review and approval of use of TDRs on receiver sites," for the receipt and use of TDRs for a Mixed-Use project referred to as "Ponce Park Residences" on the property legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

4. *A Resolution of the City Commission of Coral Gables, Florida approving Mixed-Use Site Plan and Conditional Use review pursuant to Zoning Code Article 14, "Process" Section 14-203, "Conditional Uses," for a proposed Mixed-Use project referred to as "Ponce Park Residences" on the property legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

5. *A Resolution of the City Commission of Coral Gables, Florida approving the Tentative Plat entitled "Ponce Park Residences" pursuant to Zoning Code Article 14, "Process," Section 14-210, "Platting/Subdivision," being a re-plat of 42,543 square feet (0.977 acres) into a single tract of land on the property legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29, together with a 1,318 square feet portion of University Drive that runs north of the Malaga Avenue right-of-way and west of the Ponce de Leon Boulevard right-of-way and dedication of 1,725 square feet; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

2. APPLICATION SUMMARY

The subject site is on the corner of University Drive and Ponce de Leon Boulevard, within walking distance of Ponce Circle Park. RC Acquisitions, LLC and P&J Enterprise Holdings, Inc. (referred to as "Applicants") submitted for the review of a proposed redevelopment with a mixed-use building to be located fronting Ponce de Leon Boulevard, Catalonia, University Drive, and Malaga.

On August 11, 2021, an application involving the same property was presented to the Planning & Zoning Board, at which time the Board recommended denial to the City Commission. The Applicants have since had additional meetings with the neighbors and substantially decreased the potential impact of the proposed redevelopment. The changes can be summarized as follows have:

- Withdrawal of proposed street vacation. The proposed project is no longer requesting vacation of University Drive, and therefore will not be utilizing any additional floor area ratio (FAR) from the right-of-way
- Reduction in density. The proposed unit count decreased from 161 to 80 units total
- Reduction in parking. The proposed parking was reduced from 276 to 173 spaces
- Reduction in height. The proposed height decreased from 179 to 149 feet.

	08 11 21 PZB Submittal	04 18 22 PZB Submittal
Building Site	39,948 sf (east and west parcels) 3,002 sf (alley) 13,145 sf (University Dr)	39,948 sf (east and west parcels) 3,002 sf (alley)
Total area	56,095 sf (1.29 ac)	42,950 sf (.99 ac)
Dedication (post-site plan approval)		407 sf (to change University Dr curve)
FAR	4.03 FAR (226,332 sf)	4.375 FAR (187,899 sf)
TDRs	40,000 sf	37,581 sf
Building Height / # of Stories	179' (16 stories)	149' (12 stories)
Density	125 u/a (161 units)	81 u/a (80 units)
Ground floor commercial	18,107 sf	15,671 sf
Parking	265 spaces	173 spaces
Open Space at ground level	18,468 sf (incl. ROW vacations)	26,404 sf (21,488 off-site)

The revised application is provided as Attachment A.

The mixed-use project referred to as Ponce Park Residences is located on the east-half of Block 29, in the Crafts Section approximately 42,950 square feet (0.99 acres) in size, including the public alley that the Applicants are proposing to vacate. The project now proposes 80 residential units, ground floor commercial uses of approximately 15,671 square feet, and a parking structure with 173 parking spaces. The proposed building height is 12-stories at 149 feet to the top of the habitable space.

Project Site is approximately 0.99 acres (42,950 square feet), including the alley

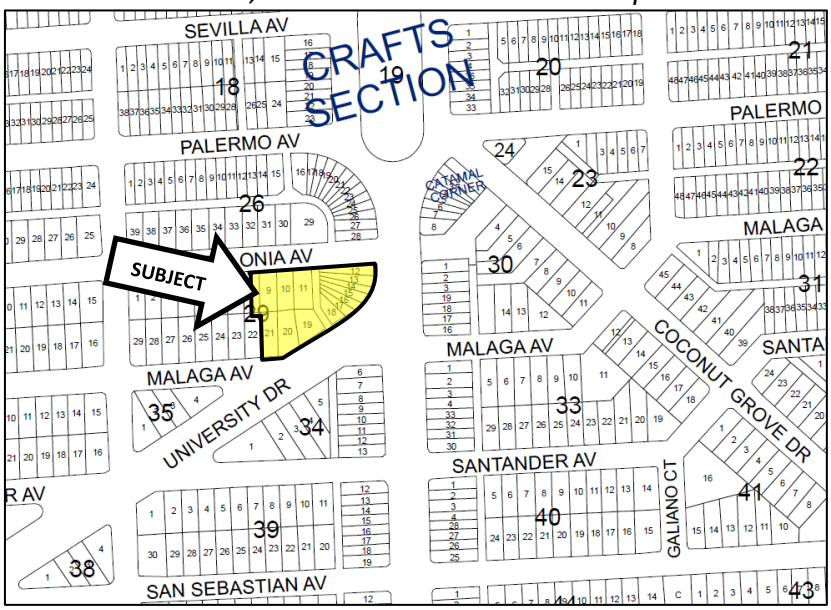
1. Building Height is 12-stories at 149' to the top of roof
2. Total proposed site FAR 4.375 (187,899 sf. including 37,581 sf. of TDRs)
3. 80 residential units
4. 15,671 square feet (8% of total square footage) of ground-floor commercial uses
5. 173 parking spaces
6. 26,404 square feet Open Space

The Applicants have submitted an application (referred to as the "Application") for review of the following: Change of Land Use from Commercial Low-Rise Intensity to Commercial High-Rise Intensity; Transfer of Development Rights (TDRs) as a receiving site utilizing 37,581 sq. ft. of TDRs made available pursuant to a Dispute Resolution Agreement; Conditional Use Review; and Tentative Plat for a Mixed-Use project referred to as Ponce Park Residences.

Project Location

The subject property occupies the east-half of Block 29 within the Crafts Section and is bounded by Catalonia Avenue (north), Ponce de Leon Boulevard (east) and the intersection of University Drive and Malaga Avenue (south). The property is legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, "Coral Gables Crafts Section," (3000 Ponce de Leon Blvd, 216 and 224 Catalonia Ave, 203 University Dr, and 225 Malaga Ave) together with that portion of University Drive that runs north of the Malaga Avenue right-of-way and west of the Ponce de Leon Boulevard right-of-way Coral Gables, Florida; as shown in the following location map and aerial:

Block, Lot and Section Location Map



Aerial

Site Data and Surrounding Uses

The following tables provide the subject property's designations and surrounding land uses:

Existing Property Designations

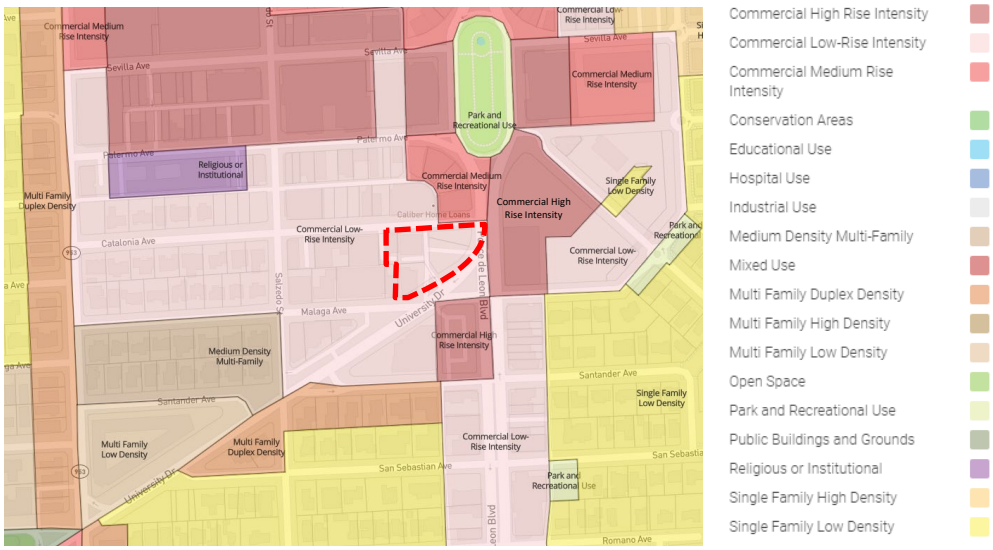
Comprehensive Plan Map designation	Commercial Low-Rise Intensity
Zoning Map designation	MX-1 (formerly Commercial)
Coral Gables Redevelopment Infill District	Yes

Surrounding Land Uses

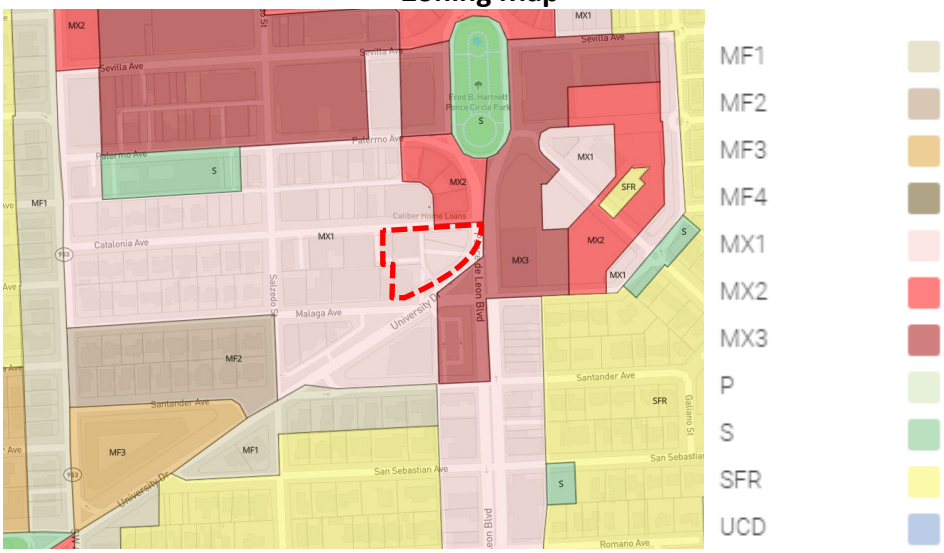
LOCATION	EXISTING LAND USES	CP DESIGNATIONS	ZONING DESIGNATIONS
North	Office building: 1 First Bank	Commercial Mid-Rise Intensity; Commercial Low-Rise Intensity	MX-2; MX-1
South	Coral Gables District Court	Commercial High-Rise Intensity; Commercial Low-Rise Intensity	MX-3; MX-1
East	The Plaza (under construction)	Commercial High-Rise Intensity	MX-3
West	Office Building	Commercial Low-Rise Intensity	MX-1

The property's existing land use and zoning designations, as illustrated in the following maps:

Future Land Use Map



Zoning Map



3. APPLICANTS' PROPOSAL

The Applicants are requesting multiple requests that require Planning & Zoning Board and Historic Preservation Board recommendations and City Commission approval.

A. Vacation of an Alley

The Applicants are proposing to vacate the existing alley that bisects the property.

City Code Chapter 62, Article VIII, "Vacation, Abandonment and Closure of Streets, Easements and Alleys by Private Owners and the City; Application Process" requires that the Public Works Department shall review all applications for the vacation of a public right-of-way in accordance with criteria set forth in City Code Sections 62-259 and 62-262.

Zoning Code, Article 14, 'Process", Section 14-211.3., "Standards for review" provides the standards for review for the proposed vacations, abandonment or closure of public streets and alleyways.

Findings of Fact – Alley Vacation

The standards provided in Zoning Code Section 14-211.3, "Standards for review" and the Applicants' response to each standard is as follows:

"The Zoning Code specifies that applications for the abandonment and vacation of city streets, alleys, special purpose easements and other non-fee interests which the City may have in real property may be approved provided that it is demonstrated that:

STANDARD FOR REVIEW	APPLICANTS' RESPONSE
The non-fee property interest sought to be abandoned does not provide a benefit to the public health, safety, welfare, or convenience, in that it is not being used by the City for any of its intended purposes.	The existing alley is not being used by the City for any of its intended purposes. The Applicants will work closely with its architect and City staff to ensure that all needs are met by the proposed driveway to the garage, loading area, and pedestrian paseo to replace the form and function of the existing alley.
The Comprehensive Plan, special purpose plan, or capital improvement program does not anticipate its use	There is no plan or program that anticipates the use of the alleyway.
Provides some benefit to the public health, safety, welfare, or convenience, but the overall benefit anticipated to result from the abandonment outweighs the specific benefit derived from the	The alley will be replaced with a mid-block paseo, which will improve pedestrian movement and safety. The trash, loading, and other aspects of the alley will be internalized within the confines of the building.

STANDARD FOR REVIEW	APPLICANTS' RESPONSE
non-fee property interest, in that the vacation or abandonment will not frustrate any comprehensive plan, special purpose plan, or capital improvement program of the City.	
The vacation or abandonment will not interfere with any planning effort of the City that is underway at the time of the application but is not yet completed.	The vacation and abandonment of the alley will not interfere with any planning effort of the City that is presently underway but not yet completed.
The vacation or abandonment will provide a material public benefit in terms of promoting the desired development and improves the City's long-term fiscal condition and the Applicants provide beneficial mitigation in the form of a proffered mitigation plan which mitigates the loss of real property, the increase in the intensity of use and/or impacts on the public health, safety and welfare including increased parking and traffic."	The requested alley vacation will provide a material public benefit to the City by improving pedestrian safety. The alley will be replaced with a mid-block paseo, which will improve pedestrian movement and safety.

Consistency Evaluation of the Comprehensive Plan (CP) Goals, Objectives and Policies

This section provides those CP Goals, Objectives and Policies applicable to the Application to vacate the alley and the determination of consistency:

REF. NO.	COMPREHENSIVE PLAN GOAL, OBJECTIVE AND POLICY	STAFF REVIEW
1.	**Objective FLU-1.1.** Preserve Coral Gables as a "placemaker" where the balance of existing and future uses is maintained to achieve a high quality living environment by encouraging compatible land uses, restoring and protecting the natural environment, and providing facilities and services which meet or exceed the minimum Level of Service (LOS) standards and meet the social and economic needs of the community through the Comprehensive Plan and Future Land Use Classifications and Map (see FLU-1: Future Land Use Map).	Complies
2.	**Objective FLU-1.2.** Efforts shall continue to be made to control blighting influences, and redevelopment shall continue to be encouraged in areas experiencing deterioration.	Complies
3.	**Objective DES-1.1.** Preserve and promote high quality, creative design and site planning that is compatible with the City's architectural heritage, surrounding development, public spaces and open spaces.	Complies

REF. NO.	COMPREHENSIVE PLAN GOAL, OBJECTIVE AND POLICY	STAFF REVIEW
4.	**Objective MOB-1.1.** Provide solutions to mitigate and reduce the impacts of vehicular traffic on the environment, and residential streets in particular with emphasis on alternatives to the automobile including walking, bicycling, public transit and vehicle pooling.	Complies
5.	**Policy MOB-1.1.2.** Encourage land use decisions that encourage infill, redevelopment and reuse of vacant or underutilized parcels that support walking, bicycling and public transit use.	Complies

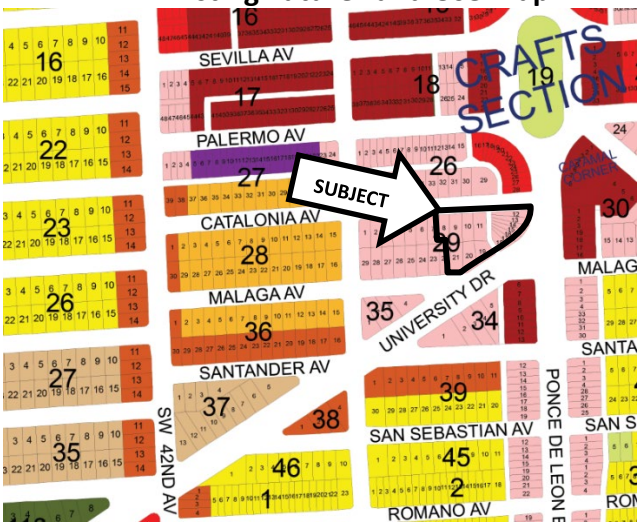
Staff Comments: Staff's determination that this application is "consistent" with the CP Goals, Objectives and Policies that are identified is based upon compliance with conditions of approval recommended by Staff, and proffered by the Applicants.

B. Comprehensive Plan Map Amendment

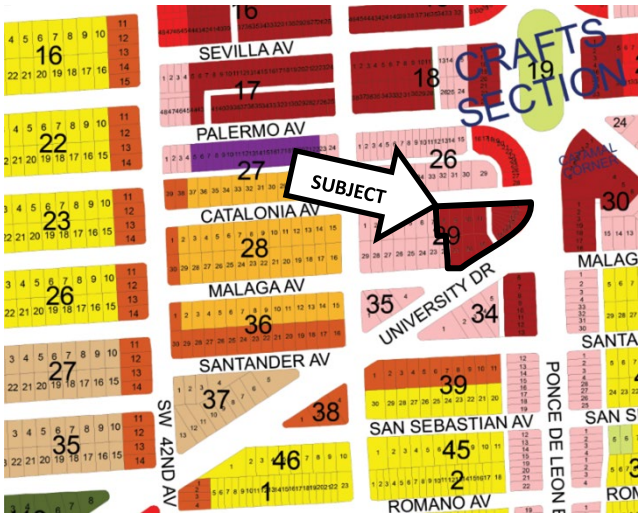
The subject site is currently designated as Commercial Low-Rise Intensity on the Comprehensive Plan Future Land Use Map. The Applicants are proposing to change the land use to **Commercial High-Rise Intensity**, with an ability to secure an additional 3 stories and have a maximum height of 190.5 feet with Mediterranean Bonus Level 2.

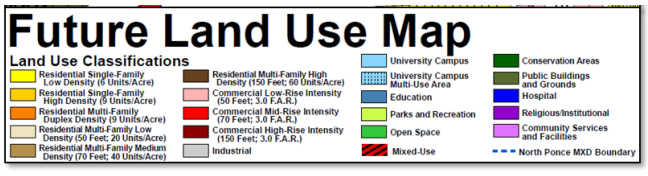
A comparison of the property's existing Future Land Use Map designations and the Applicants' requested designation is shown on the following maps:

Existing Future Land Use Map



Proposed Land Use Map





Findings of Fact- Land Use Map Amendment

Zoning Code Section 14-213.6 provides review standards for Comprehensive Plan amendments:

Standard	Staff Evaluation
1. Whether it specifically advances any objective or policy of the Comprehensive Land Use Plan.	The Comprehensive Plan map amendment from Commercial Low-Rise Intensity to Commercial High-Rise Intensity facilitates a taller building to advance the objectives and policies in multiple Comprehensive Plan elements that encourage mixed use development and urban housing options near downtown that reduce the need to drive.
2. Whether it is internally consistent with Comprehensive Land Use Plan.	The proposed mixed-use redevelopment is consistent with the Commercial High-Rise land use, as it allows for mixed-use development.
3. Its effect on the level of service of public infrastructure.	The proposed map amendment will support enhanced multi-modal activity along Ponce de Leon Boulevard if developed as a mixed-use building that would reduce traffic in the area by encouraging residents to work where they live, and walk, bike, or use transit.
4. Its effect on environmental resources.	The proposed amendment promotes urban infill redevelopment on a currently underutilized land with deteriorating buildings. No significant environmental resources will be impacted.
5. Its effect on the availability of housing that is affordable to people who live or work in the City of Coral Gables.	The proposed amendment will provide additional multi-family housing opportunities near downtown with access to frequent transit service, biking distance to multiple destination, and pedestrian access to dining, shopping, and employment opportunities. The project contributes to the provision of additional housing options for people who live, work, and study in the City.
6. Any other effect that the City determines is relevant to the City Commission's decision on the application.	Related to this application, the Applicants are also requesting a vacation of the alley that bisects the property. If this vacation and the proposed map amendments are to approved, the proposed land use would also be applied to the vacated alley.

Staff comments:

The request to change the land use from Commercial Low-Rise to High-Rise is a significant increase of allowed height for the subject property. The existing maximum building height is 77 feet. The Applicants are proposing to change the land use for a maximum building height of 190.5 feet. However, the proposed site plan offers a mixed-use building with a height of 149 feet that would allow residents to live close to downtown. This proximity to work, restaurants, shopping, and entertainment would reduce traffic, as people will have the option to walk, bike, or use transit.

C. Transfer of Development Rights (TDRs)

The Applicants are requesting the receipt of 37,581 square feet of TDRs. Although not a receiver site, on

August 17, 2019, by Resolution No. 2019-252, the City Commission approved the Applicants to file an application, pursuant to a Dispute Resolution Agreement between the City and Mundomed S.A. and South High Cliff Corporation. As a result of this Dispute Resolution Agreement, specific TDRs were created to preserve some environmentally-sensitive lands which TDRs may be transferred and utilized not only within the boundaries of designated receiving areas (CBD and North Ponce Mixed-Use Corridor), but also in Commercial and Industrial zoned areas.

The City's Comprehensive Plan Table FLU-2. Commercial Land Uses states that "up to an additional 25% F.A.R. may be granted for properties qualifying as receiving sites for Transfer of Development Rights (TDRs)."

The Historic Preservation Board reviewed and approved the request to receive Transfer of Development Rights (TDRs) at their October 2021 meeting, as required by the Zoning Code because the subject site is within 500 feet of a local historic landmark.

Findings of Fact – Transfer of Development Rights (TDRs)

Sections 14-204.5 and 14-204.6 of the Zoning Code establish the requirements for the use of TDRs on receiver sites. Those provisions state that the Planning and Zoning Board and City Commission may recommend conditions of approval that are necessary to ensure compliance with the criteria and standards as specified in the Zoning Code.

Below is the review and approval process of use of TDR's on receiver sites as set out in Zoning Code Section 14-204.6, as follows:

A. *"An application to transfer development rights to a receiver site shall be reviewed subject to all of the following":*
   1. *"In conformance with any applicable conditions of approval pursuant to the Certificate of TDRs."*
   2. *"Board of Architects review and approval subject to Section 5-100, Design Review Standards."*
   3. *"If the receiving site is within five hundred (500) feet of a local historic landmark, Historic Preservation Board review and approval is required to determine if the proposal shall not adversely affect the historic, architectural, or aesthetic character of the property".*
   4. *"Planning and Zoning Board review and recommendation and City Commission review to determine if the application satisfies all of the following":*
      a. *"Applicable site plan review requirements per Section 14-202, General Development Review Procedures and conditional use review requirements per Section 14-203, Conditional Uses".*
      b. *"The extent to which the application is consistent with the Zoning Code and City Code otherwise applicable to the subject property or properties, including but not limited to density, bulk, size, area and use, and the reasons why such departures are determined to be in the public interest".*
      c. *"The physical design of the proposed site plan and the manner in which the design makes use of adequate provisions for public services, provides adequate control over vehicular traffic, provides for and protects designated common open areas, and furthers the amenities of light and air, recreation and visual enjoyment".*
      d. *"The conformity of the proposal with the Goals, Objectives and Policies of the City's Comprehensive Plan".*

5. *Notice of hearings provided in accordance with the provisions of Article 15 of these regulations.*

Staff Comments: The Applicants are requesting the utilization of **37,581 sq. ft**. of TDRs in this project, which meets the 25% maximum increase of floor area ratio (FAR). The proposed building density, bulk, size, area and use are all consistent with the allowed development of the property, upon approval of the requested change of land use to Commercial High-Rise Intensity. The proposed site plan includes improvements and possible expansion of pedestrian space at the northwest corner of University Drive and Ponce de Leon Boulevard. The vehicular entrances to the proposed building offer priority to pedestrian circulation and further protects designated common open areas within the public rights-of-way. The proposed uses of ground floor commercial and residential on the upper floors conforms to the goals, objectives, and policies of the Comprehensive Plan to encourage mixed use development and urban housing options near downtown that reduce the need to drive.

D. Mixed Use Site Plan

The Applicants are requesting Conditional Use Review for the proposed mixed-use site plan. The Applicants are authorized to use the Mixed-Use District (MXD) regulations of the former 2007 Zoning Code, as the building design already received Board of Architects approval prior to the adoption of the Zoning Code Update. The Zoning Code Update has updated standards, such as stepbacks, mixes of uses, setbacks, and other regulations. The former MXD process that existed in the 2007 Zoning Code is voluntary and property owners who choose to develop under these regulations are required to undergo Site Plan review in accordance with the Conditional Use process pursuant to the requirements established in Zoning Code Article 14, Section 14-203, "Conditional Uses."

Site Plan Information:

Type	Allowed/Required	Proposed
Area existing lot	20,000 sq. ft.	39,948 sq. ft. (east and west parcels)
Proposed alley vacation		3,002 sq. ft.
Total area		42,950 sf (.99 ac)
FAR	3.0, or 3.5 with Med Bonus Level 2	196,333 sq. ft.
TDRs	25% maximum increase	30,000 square feet (13% increase) (21% increase on private parcels only)
Total FAR	4.375 (3.5 + TDRs)	**4.375 FAR** (187,899 sq. ft.)
Building height	Existing land use: Commercial Low-Rise Intensity 50 ft., 77 feet (Med Bonus Level 2) Proposed land use: Commercial High-Rise Intensity 150 ft., 190.5 feet (Med Bonus Level 2)	149 feet to top of habitable space
Number of stories	After change of land use to Commercial High-Rise Intensity: 16 floors/190.5 feet	**12 stories**
Proposed Uses:		

Type	Allowed/Required	Proposed
Residential	Density: 125 units/acre 126 units (incl. alley vacation)	Density: 81 units/acre **80 units**
Ground Floor Commercial	15,671 sq. ft. (8%)	15,671 sq. ft. (8%)
Parking		
Residential Units		
1BR, 23 units @1/units	23 spaces	
2BR, 22 units @1.75/unit	38 spaces	
3BR, 35 units @2.25/unit	78 spaces	
Retail @ 1 space/300	52 spaces (15,671 sq. ft./300)	
Total Parking	173 per shared parking analysis	173 spaces
Open Space at ground level	4,295 sq. ft. (10%) of the site area (incl. alley vacation)	7.5% on-site arcade 21,488 sf (off-site)

Setbacks*	Permitted/Required	Permitted/Required
Primary street frontages Ponce de Leon Blvd	10 ft.	0 feet (Building setback reductions per Mixed Use and Med Bonus)
Side street (North) (Catalonia Avenue)	15 ft.	0 feet (Building setback reductions per Mixed Use and Med Bonus)
Side street (South) (Malaga Avenue)	15 ft.	0 feet (Building setback reductions per Mixed Use and Med Bonus)
Rear (Westside)	10 ft.	0 feet (Building setback reductions per Mixed Use and Med Bonus)

* *Setback reductions may be awarded for MXD projects subject to providing vertical building stepbacks, a minimum of 10 ft. at maximum height of 45 ft. on all facades.*

Findings of Fact – Mixed-Use Site Plan

Conditional Use Review Criteria

Planning Staff's review of the criteria set out in Section 14-203.8, "Standards for Review" is as follows:

STANDARD	STAFF EVALUATION
1. The proposed conditional use is consistent with and furthers the goals, objectives and policies of the Comprehensive Land Use Plan and furthers the purposes of these regulations and other City ordinances and actions designed to implement the Plan.	**Yes.** The Application for Mixed Use Site Plan review is "consistent" with the CP's Goals, Objectives and Policies with the recommended conditions of approval and site plan provisions incorporated by the Applicants which address the City objectives for encouraging mix of uses within the city's urban areas bounded by Bird Road, LeJeune Road, U.S. 1 and Ponce de Leon Boulevard. The geographic area encompasses a large area that is served by numerous residential, commercial, retail and office uses. The area is served by the Coral Gables Trolley and regional Miami-Dade Metrorail at Douglas Station.
2. The available use to which the property may be put is	**Yes.** The subject property is located south of downtown with some existing and approved mixed-use buildings. Therefore,

	STANDARD	STAFF EVALUATION
	appropriate to the property that is subject to the proposed conditional use and compatible with existing and planned uses in the area.	the proposed residential uses on the formerly commercial site is compatible with other properties in the area.
3.	The proposed conditional use does not conflict with the needs and character of the neighborhood and the City.	The subject property is requesting to construct a building of similar scale to the surrounding neighborhood of The Plaza, the Zubi building, and Regions Bank. The proposed commercial and residential uses do not conflict with the needs and character of the mixed use, residential, and commercial neighborhood.
4.	The proposed conditional use will not adversely or unreasonably affect the use of other property in the area.	The proposed mixed-use building continues the mixed-use policy within the downtown area together with other mixed-use properties in the area and will not unreasonably affect the use of their properties.
5.	The proposed use is compatible with the nature, condition and development of adjacent uses, buildings and structures and will not adversely affect the adjacent uses, buildings or structures	**Yes.** The request to construct a mixed-use building is compatible with the allowed development of adjacent buildings and structures. The addition of residential uses to the commercial property will complement the existing commercial uses in the downtown area and along Ponce de Leon Boulevard and not adversely affect the adjacent uses or buildings.
6.	The parcel proposed for development is adequate in size and shape to accommodate all development features.	**Yes.** The subject property is larger than the minimum 20,000 square foot size for a mixed-use project within an approved MXD and MXOD.
7.	The nature of the proposed development is not detrimental to the health, safety and general welfare of the community.	**Yes.** Commercial and mixed-use properties surround the project site, and the proposed project is consistent with the stated goals and objectives for mixed use redevelopment. The redevelopment of this property as a mixed use project fulfills the objective of the City to attract residential developments to downtown and to create an urban environment designed for people.
8.	The design of the proposed driveways, circulation patterns and parking is well defined to promote vehicular and pedestrian circulation.	**Yes.** All vehicular parking for the project is located within the confines of the building to be accessed from Catalonia, and service access and areas are enclosed to be accessed from Malaga. Arcades and a pedestrian paseo are provided to encourage and facilitate pedestrian circulation through and around the project site and surrounding district. Staff's recommended conditions of approval include the requirement for a level and continuous sidewalk through these driveways to prioritize pedestrian circulation.
9.	The proposed conditional use satisfies the concurrency standards of Section 14-218 and will not adversely burden public facilities, including the traffic-	**Yes.** The proposed project was reviewed by the Zoning Division and meets concurrency and does not adversely burden public facilities. Furthermore, a Traffic Impact Study was done by Kimley Horn & Associates with the Public Works Department and is

STANDARD	STAFF EVALUATION
carrying capacities of streets, in an unreasonable or disproportionate manner.	attached. Additionally, certain conditions of approval are recommended to ensure the project meets required infrastructure.

Traffic Study

The subject site is within the Gables Redevelopment Infill District (GRID). The City's GRID allows development within its boundaries to move forward regardless of a roadway's level of service (LOS). The City does, however, require all developments within the GRID that increase intensity/density beyond a 50 additional trips threshold to complete a Traffic Impact Study (TIS). The TIS was completed in November 2020 prepared by Kimley Horn & Associates for the Public Works Department when the project had substantially more residential units, commercial, and general impact on the area's streets. The study demonstrated that there were no significant impacts to the surrounding roadways with the prior proposed development. Since the project has decreased the proposed number of units and overall impact, the trip generation analysis was updated and was determined that a TIS is no longer required by Public Works.

Concurrency Management

This project has been reviewed for compliance with the City's Concurrency Management program. The Concurrency Impact Statement (CIS) for the project indicates that there is adequate infrastructure available to support the project.

Public School Concurrency Review

Pursuant to the Educational Element of the City's Comprehensive Plan, Section 14-218.4 of the Zoning Code, and State of Florida growth management statute requirements, public school concurrency review is required prior to final Board of Architects review for all applications for development approval in order to identify and address the impacts of new residential development on the levels of service for public school facilities. Adequate school capacity must be available. If capacity is not available, the developer, school district and affected local government must work together to find a way to provide capacity before the development can proceed. A letter issued by the Miami-Dade County Public School Board dated September 3, 2020 states the proposed project had been reviewed and that the required Level of Service (LOS) standard had been met. A copy of that letter is provided as part of Attachment A.

Art in Public Places Program

The Applicants are required to satisfy the City's Art in Public Places program by either providing public art on site or providing a contribution to the Art in Public Places Fund. The Applicants propose to provide contribution to the Art in Public Places Fund in compliance with Zoning Code regulations. A portion of the contribution will be used by the City to provide art at Ponce Circle Park.

Off-site improvements and Undergrounding of Overhead Utilities.

The Applicants proffered at least one million dollars ($1,000,000) of in-kind improvements, inclusive of both hard and soft costs, to improve the University Drive right-of-way and park area abutting the property, in conjunction with its development of the Project, and in accordance with a design to be designated by the City and in compliance with all applicable laws and other legal requirements. The City shall provide final design, which shall be reviewed and approved administratively by the Planning Director, no later than

sixty (60) business days after approval of the Project by the City Commission. The construction of all Improvements shall be exclusively performed by the Applicants. Upon completion, the Applicants shall thereafter maintain the park area at its sole cost and expense. A Restrictive Covenant will be executed to capture this contribution prior to consideration by the City Commission.

The provisions in Zoning Code for Mixed-Use Districts require that all utilities shall be installed underground pursuant to the direction of the Public Works Department. In accordance with that requirement, all utilities within the public right-of-way adjoining the project site will be installed underground. To assist in a cohesive undergrounding of all utilities, in furtherance of satisfying Zoning Code Article 2 "Zoning Districts," and Article 14, "Conditional Uses," Section 14-203, "Standards for review," the Applicants are required to underground all existing overhead utilities.

E. Tentative Plat

Related to the alley vacation request, the Applicants are proposing a re-plat of the private property to reflect the vacated alley and donation of private property that slightly alters the curve of University Drive at Ponce de Leon Boulevard. The proposed tentative plat contains a single track, Tract "A," that will become the building site for the Project.

The proposed vacation of the alley and the alteration of the curve on University Drive requires two amendments to the historic City Plan, as the City Plan includes both the street grid and the alleys of the city. The Historic Preservation Board (HPB) reviews all amendments to the historic City Plan and provides recommendations to the City Commission. In October 2021, the HPB recommended denial of both the amendments of the City Plan for the vacation of the alley and the vacation of University Drive (because the request was vacating the entire portion of University Drive). The Applicant wishes to proceed to the City Commission after the Planning & Zoning Board with these recommendations from HPB.

Findings of Fact - Tentative Plat Review

The procedure for reviewing and recommending a tentative plat is contained in Sections 14-210.1 through 14-210.4 of the Zoning Code. The Planning and Zoning Board provides a recommendation on tentative plats to the City Commission. The final plat is prepared from the tentative plat, with a final review and approval in resolution form by the City Commission. Administrative review and approval of the final plat by the Miami-Dade County Subdivision Department is required prior to the City Commission hearing. The tentative plat is provided in the submitted Application (see Attachment A).

City Staff Review

This tentative plat was submitted for review to the Development Review Committee (DRC) and distributed to City Departments as required in Zoning Code Section 14-210.2. The Zoning Code requires review and comments be provided by the Public Works Department, which have been sent to the Applicants. Further review is required by the Public Works Department and Miami-Dade County prior to final plat consideration by the City Commission.

Consistency Evaluation of the Comprehensive Plan (CP) Goals, Objectives and Policies

This section provides those Comprehensive Plan Goals, Objectives and Policies applicable to the proposed re-plat and the determination of consistency:

REF. NO.	COMPREHENSIVE PLAN GOAL, OBJECTIVE AND POLICY	STAFF REVIEW
1.	**Policy FLU-1.11.1.** Maintain and enforce effective development and maintenance regulations through site plan review, code enforcement, and design review boards and committees.	Complies
2.	**Goal DES-1.** Maintain the City as a livable city, attractive in its setting and dynamic in its urban character.	Complies
3.	**Objective DES-1.1.** Preserve and promote high quality, creative design and site planning that is compatible with the City's architectural heritage, surrounding development, public spaces and open spaces.	Complies
4.	**Objective HOU-1.5.** Support the infill of housing in association with mixed use development.	Complies
5.	**Policy MOB-1.1.1.** Promote mixed use development to provide housing and commercial services near employment centers, thereby reducing the need to drive.	Complies

Staff Comments: Staff's determination that the re-plat as proposed is consistent with the CP Goals, Objectives and Policies. The single tract slightly alters the curve of University Drive with the dedication and vacation of segments along the University Drive frontage. While slightly altering the curve, the proposed curve maintains the historic intent of the original plat and urban character of the Crafts Section. The re-plat is consistent with the many goals of the Comprehensive Plan to promote development that achieves proper relationship between the uses of land and surrounding areas. The alteration of the curve and re-platting of the existing alley supports redevelopment of the property to accommodate mixed-use development with the associated residential units. The proposed project complies with zoning regulations and has been reviewed by multiple design review boards.

4. REVIEW TIMELINE AND PUBLIC NOTIFICATION AND COMMENTS

City Review Timeline

The submitted applications have undergone the following City reviews:

TYPE OF REVIEW	DATE
Development Review Committee	07.31.20
Board of Architects (Preliminary Design and Mediterranean Architecture)	11.19.20
Planning and Zoning Board	02.10.21
Historic Preservation Board	02.17.21
Planning and Zoning Board	08.11.21
Historic Preservation	10.20.22
Board of Architects	04.07.22

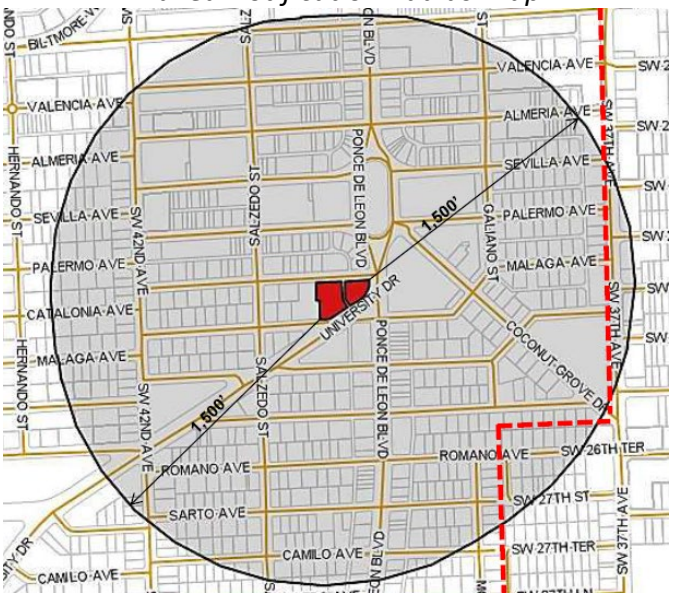
TYPE OF REVIEW	DATE
Planning & Zoning Board	06.08.22
City Commission (1st reading)	TBD
City Commission (2nd reading)	TBD

Public Notification and Comments

The Applicants held the mandatory neighborhood meeting on November 24, 2020 with notification to all property owners within 1,500 of the property.

The Zoning Code requires that a mailed notification be provided to all property owners within 1,500 feet of the property. The notification was sent on May 25, 2022. The notice indicates the following: applications filed; public hearing dates/time/location; where the application files can be reviewed and provides for an opportunity to submit comments. Approximately 835 notices were mailed. A copy of the legal advertisement and courtesy notice are provided as Attachment E. A map of the notice radius is provided below.

Mailed Notification Radius Map



The following has been completed to solicit input and provide notice of the Application:

Public Notice

TYPE	DATE
Applicants neighborhood meeting	11.24.20
Courtesy notification for February PZB	01.28.21
Sign posting of property for February PZB	01.29.21
Legal advertisement for February PZB	01.29.21
Posted Staff report on City web page for February PZB	02.05.21
Mailed notification for August PZB	07.28.21

TYPE	DATE
Sign posting of property for August PZB	07.30.21
Legal advertisement for August PZB	07.30.21
Posted Staff report on City web page for August PZB	08.06.21
Mailed notification for May PZB	04.28.22
Sign posting of property for May PZB	04.29.22
Legal advertisement for May PZB	04.29.22
Mailed notification for June PZB	05.25.22
Sign posting of property for June PZB	05.27.22
Legal advertisement for June PZB	05.27.22
Posted Staff report on City web page for June PZB	06.03.22

5. Staff Recommendation.

The Planning Division based upon the complete Findings of Fact contained within this Report recommends the following:

1. *An Ordinance of the City Commission of Coral Gables, Florida, approving the vacation of a public alleyway pursuant to Zoning Code Article 14, "Process," Section 14-211, "Abandonment and Vacations" and City Code Chapter 62, Article 8, "Vacation, Abandonment and Closure of Streets, Easements and Alleys by Private Owners and the City; Application Process," providing for the vacation of the twenty (20) foot wide alley which is approximately one hundred and fifty-five (155) feet in length lying between Lots 12 thru 18 and Lots 11 and 19 in Block 29, Crafts Section (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

   Staff recommends **Approval.**

2. *An Ordinance of the City Commission of Coral Gables, Florida amending the Future Land Use Map of the City of Coral Gables Comprehensive Plan pursuant to Zoning Code Article 14, "Process," Section 14-213, "Comprehensive Plan Text and Map Amendments," and Small Scale amendment procedures (ss. 163.3187, Florida Statutes), from "Commercial Low-Rise Intensity" to "Commercial High-Rise Intensity" for Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29 (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE) (LPA review)*

   Staff recommends **Approval**.

3. *A Resolution of the City Commission of Coral Gables, Florida approving receipt of Transfer of Development Rights (TDRs) pursuant to Zoning Code Article 14, "Process," Section 14-204.6, "Review and approval of use of TDRs on receiver sites," for the receipt and use of TDRs for a Mixed-Use project referred to as "Ponce Park Residences" on the property legally described as Lots 8 through 21, less the*

West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)

Staff recommends **Approval**.

4. *A Resolution of the City Commission of Coral Gables, Florida approving Mixed-Use Site Plan and Conditional Use review pursuant to Zoning Code Article 14, "Process" Section 14-203, "Conditional Uses," for a proposed Mixed-Use project referred to as "Ponce Park Residences" on the property legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

   Staff recommends **Approval, with conditions**.

5. *A Resolution of the City Commission of Coral Gables, Florida approving the Tentative Plat entitled "Ponce Park Residences" pursuant to Zoning Code Article 14, "Process," Section 14-210, "Platting/Subdivision," being a re-plat of 42,543 square feet (0.977 acres) into a single tract of land on the property legally described as Lots 8 through 21, less the West ½ of lot 8, Block 29, Crafts Section, together with that portion of the 20-foot platted alley lying east of Lots 11 and 19, of said Block 29, together with a 1,318 square feet portion of University Drive that runs north of the Malaga Avenue right-of-way and west of the Ponce de Leon Boulevard right-of-way and dedication of 1,725 square feet; (3000 Ponce de Leon Blvd, 216 & 224 Catalonia, 203 University Dr, and 225 Malaga), Coral Gables, Florida; including required conditions; providing for a repealer provision, severability clause, and providing for an effective date. (LEGAL DESCRIPTION ON FILE)*

   Staff recommends **Approval**.

Conditions of Approval

In furtherance of the Comprehensive Plan's Goals, Objectives and Policies, and all other applicable Zoning Code and City Code provisions, the recommendation for approval of the proposed project is subject to all of the following conditions of approval. The proposed conditions address many of the deficiencies noted in Staff's findings above and are meant to lessen the potential impact of the proposed development and allow the development to integrate and blend in with the existing context. Additional conditions of approval may be added to this list prior to Commission review.

1. **Application/supporting documentation.** Construction of the proposed project shall be in substantial conformance with all of the following:
   a. The Applicants' submittal package dated 4/13/2022 prepared by Oppenheim Architecture to include:
      i. Maximum building height shall not exceed 149'-10"

ii. 4.375 FAR (187,899 sq. ft.)
iii. 80 dwelling units
iv. 15,671 square feet of commercial space
v. Minimum of 26,404 sq. ft. landscape open space, including the right-of-way

b. All representations proffered by the Applicants' representatives as a part of the review of the Application at public hearings.

2. **Restrictive covenant.** Within thirty (30) days of City Commission approval of the Application, the Applicants, property owner(s), its successors or assigns shall submit a restrictive covenant for City Attorney review and approval outlining all conditions of approval as approved by the City Commission. Failure to submit the draft restrictive covenant within the specified time frame shall render the approval void unless said time frame for submittal of the draft restrictive covenant is extended by the City Attorney after good cause as to why the time frame should be extended. It is recognized that the requirements contained in the restrictive covenant constitute regulatory conditions of approval and shall survive as regulatory conditions of approval even if the restrictive covenant is later found to be void or unenforceable.

3. **Prior to issuance of the first Building Permit**, Applicants shall:
   a. **Impact Fees.** The Applicants shall include the payment of all applicable City of Coral Gables impact fees, sewer capacity fees and service charges prior to the issuance of a building permit. No impact fee shall be waived.
   b. **Off-site and Public Realm Improvements and Contribution.**
      i. **Improvements**. The Applicants shall be responsible to make one-million dollars ($1,000,000) of in-kind improvements, inclusive of both hard and soft costs, to improve the University Drive right-of-way and the abutting "Park Area," in conjunction with its development of the Project, and in accordance with a design to be designated by the City and in compliance with all applicable laws and other legal requirements. The City shall be provided with a final design, which shall be reviewed and approved administratively by the Public Works Department and the Planning Division, no later than sixty (60) business days after approval of the Project by the City Commission. The construction of all Improvements shall be exclusively performed by the Applicants prior to Temporary Certificate of Occupancy or within a year of approval, whichever occurs first. Upon completion, the Applicants shall thereafter maintain the Park Area at its sole cost and expense.
      ii. **Maintenance and Expense**. The Applicants, at its sole cost and expense, shall maintain the Park Area and the Improvements thereon in good order, condition, and repair and in a safe, clean, fully functional and attractive manner.
      iii. **Insurance**. The Applicants, at its sole cost and expense, shall procure and maintain at all times, a comprehensive commercial general liability insurance policy written on an occurrence basis, issued by a good and solvent insurance company authorized and licensed to do business under the laws of the State of Florida.

c. **Art in Public Places.** The Applicants shall provide a complete and notarized copy of the Project Value Application to the City. Prior to the issuance of the first Building Permit, the Applicants must make the required contribution to the appropriate Art in Public Places fund or receive approval for a waiver in accordance with the requirements of Article 9.
d. **On-street parking.** Payment shall be provided by the Applicants, its successors or assigns according to established City requirements for the loss of any on-street parking space as a result of the project.
e. **Signage.** Provide Signage Plan indicating code compliant size and location of all proposed exterior signage.
f. **Construction Staging.** A construction staging plan shall be submitted to the Building Division. A checklist of requirements shall be provided upon request. Construction phasing/staging shall maintain pedestrian access and vehicle circulation along Ponce de Leon Boulevard with all sidewalks on Ponce de Leon Boulevard to remain open throughout construction.
g. **Traffic Improvements.** All proposed traffic flow modifications including street design, width, sight triangles, cross walks, diverters, etc. shall require written conceptual approval of Miami-Dade County and the City prior to the issuance of the first City permit for vertical construction. If any components of the proposed modifications are not approved, the proposed plans shall be revised in coordination with Public Works and Planning Staff.
h. **Encroachment Plan.** Obtain Commission approval by resolution of an Encroachment Plan addressing special treatment sidewalks, decorative pavers, landscaping, irrigation, street lighting, landscaping lighting and any other encroachments into, onto, under and over the right of way as shown in the site plan. The above encroachments must be approved by City resolution and a Hold Harmless agreement must be executed approving the encroachments.
i. **Encroachment Agreement and Covenant.** Execute and record a restrictive covenant regarding encroachments and utilities in, below and above the public rights-of-way, in a form acceptable to the Public Works Director, the Risk Management Division, and the City Attorney, which shall include the precise locations and dimensions of the proposed areas of all encroachments. It is recognized that the requirements contained in the restrictive covenant constitute regulatory conditions of approval and shall survive as regulatory conditions of approval even if the restrictive covenant is later found to be void or unenforceable.
j. **Bond to Restore Project Property**. Provide to the City a surety bond, or other form of security deemed acceptable by the City, covering the estimated maximum cost of the full restoration of the Property, including installation of sod and landscaping to City Code standards, and removal of all construction fencing.
k. **Construction Notices**. Provide written notice to all properties within one thousand (1,000) feet of the project boundaries providing a specific liaison/contact person for the project including the contact name, contact telephone number and email, to allow communication between adjacent neighbors or interested parties of construction activities, project status, potential concerns, etc.

4. **Prior to issuance of the first Certificate of Occupancy or Temporary Certificate of Occupancy,** Applicants shall:

a. **Sustainability Certification.** The developer/owner/contractor shall provide the City with a performance bond, cash or irrevocable letter of credit payment (Green Building Bond) in the amount of three (3%) percent of the master building permit construction cost value.
b. **Underground utilities.** Submit all necessary plans and documents and complete the undergrounding of all new utilities along all public rights-of-way surrounding and adjacent project boundary, subject to review and approval by the Directors of Public Works, Landscape Services and Planning and Zoning.
c. **Utility Upgrades.** Water and Sewer system upgrades and all associated right-of-way improvements may be required to be completed, at the Applicants' expense.
d. **Art in Public Places.** The Applicants shall comply with all City requirements for Art in Public Places.
e. **Bicycle/Pedestrian Plan.** The bicycle and pedestrian paths on University Drive/Malaga shall comply with the City's Bicycle Pedestrian Master Plan to be designed as Bike Lanes, to be reviewed and approved by the Public Works Director. All driveways shall be designed with a flare-style curb cut with a continuous and level sidewalk through each driveway to create a pedestrian-friendly environment.
f. **Right-of-way and public realm improvements.** Install all one-million dollars ($1,000,000) of in-kind right-of-way improvements and the abutting park area, subject to review and approval by Public Works Department and the Planning and Zoning Division. Any changes to and departures from the right-of-way and public realm improvements identified via the permitting process shall be subject to review and approval by Directors of Public Works, Landscape Services, Planning and Zoning, and Parking. The construction of all Improvements shall be exclusively performed by the Applicants prior to temporary Certificate of Occupancy or within one (1) year after Commission approval, whichever occurs first. Upon completion, the Applicants shall thereafter maintain the Park Area at its sole cost and expense.

5. **Following issuance of the first Certificate of Occupancy**, Applicants shall:
   a. **Sustainability Certification.** Within two years of the issuance of a Final Certificate of Occupancy, the building must achieve LEED Silver or equivalent certification. If the applicants choose to pursue NGBS Silver Certification, an Energy Star Label will also be required within two years of the Final Certificate of Occupancy.
      i. The City will hold the Green Building Bond for the time necessary for the green certification, or equivalent, to be issued for twenty-four (24) months after issuance of the Certificate of Occupancy or Completion; whichever occurs first. Upon receiving final documentation of certification from the developer/owner/contractor, the City shall release the full amount of the bond within thirty (30) days.
      ii. If the developer/owner/contractor is unable to provide proof of green certification, or equivalent, within twenty-four (24) months after issuance of the Certificate of Occupancy or Completion, the full amount of the Green Building Bond shall be forfeited to the City. Any proceeds from the forfeiture of the bond under this section shall be allocated toward funding Sustainability Master Plan initiatives.
   b. **Traffic Monitoring**. At the Applicants' expense, the City shall perform an annual traffic monitoring study for three years beginning one year from the issuance of the first

Temporary Certificate of Occupancy at locations to be determined by the Public Works Director. If the Public Works Director determines that livability improvements are warranted on any of these roadways, the Applicants shall construct or pay for any physical livability improvements required by these studies within one year of the completion of these studies, as approved by the Public Works Director.

ATTACHMENTS

A. Applicants' Amended submittal package.
B. Updated Trip Generation Analysis.
C. Notice mailed to all property owners within 1,500 feet and legal ad.
D. PowerPoint Presentation.

Please visit the City's webpage at www.coralgables.com to view all Application materials, notices, applicable public comments, minutes, etc. The complete Application and all background information also is on file and available for examination during business hours at the Planning and Zoning Division, 427 Biltmore Way, Suite 201, Coral Gables, Florida, 33134.

Respectfully submitted,

06-03-22

Suramy Cabrera, PE
Director of Development Services
City of Coral Gables, Florida

Pagination

* So. 2d

Majority Opinion > Table of Cases

District Court of Appeal of Florida
Third District

The City of Coral Gables, Florida, a Florida municipal corporation, Appellant,
v.
Old Cutler Bay Homeowners Corporation, et al., Appellees.

No. 88-143.

July 19, 1988

Rehearing Denied September 12, 1988

Robert D. Zahner, Coral Gables, for appellant.

Daniels and Hicks, P.A., and Angela C. Flowers and Sam Daniels, Miami, for appellees.

Before HUBBART, DANIEL S. PEARSON and JORGENSON, JJ.

[*1189] PER CURIAM.

The City of Coral Gables appeals from a permanent injunction enjoining the construction of a fire station on a tract of land acquired by the City through dedication. We affirm based upon our agreement with the trial court's conclusion that the specific language of the dedication bars the proposed fire station.

In June, 1986, the City issued resolution number 25671, announcing its plan to build a fire station on the property located at the entrance to the Old Cutler Bay subdivision, a community of single family homes. The Old Cutler Bay Homeowners Corporation, Inc., and several property owners filed a complaint for injunctive relief to prevent the construction of the fire station. Following a hearing, the trial court entered a permanent injunction against the City, making the following findings of fact and conclusions of law:

> 1. That the City of Coral Gables accepted the subject property pursuant to a Dedication on March 8, 1965 which Dedication was recorded in Official Records Book *4763 at Page 736* of the Public Records of Dade County, Florida.
>
> 2. That the City of Coral Gables accepted the Dedication pursuant to City of Coral Gables Ordinance No. 1463 dated February 23, 1965 which Ordinance accepted the Dedication and the

terms, conditions and restrictions contained therein.

3. That the Dedication provided that the property was for the perpetual use of the public and that the five buildings which were on the Dedicated property may be used for municipal purposes and if not so used then removed.

4. That the subject buildings were not used for municipal purposes and were therefore removed from the property.

5. That the Dedication further provided that the remainder of the Dedicated property shall be landscaped and maintained by the municipality in a decorative manner.

6. That the City of Coral Gables has, by City of Coral Gables, Florida, Resolution No. 25671 resolved to commence construction of Fire Station No. 3 on the subject property.

7. That Resolution No. 25671 is in violation of the terms of the Dedication and Ordinance and is inconsistent with the restrictions contained within said Dedication.

The trial court correctly determined that the City could not divert the use of the land for a purpose inconsistent with the terms of the dedication. *Kramer v. City of Lakeland*, 38 So.2d 126 (Fla.1948). Once the City elected to demolish the five existing structures on the property, it could not replace them with a fire station without violating the restrictions of the dedication. The City's reliance on *City of Tampa v. Hickey*, 502 So.2d 1254 (Fla. 2d DCA 1986), *rev. denied*, 503 So.2d 327 (Fla.1987), is misplaced because the property at issue in *Hickey* had not been acquired through dedication. Indeed, the property in that case had been conveyed by a plat which did not specify that the land was to be used for a park. Here, the dedication expressly limited the City's use of the land.

We also disagree with the City's contention that it held fee simple title to the property after the expiration of the twenty-one-year reverter period set forth in *section 689.18*, Florida Statutes (1987). *Section 689.18(5)* exempts conveyances to governmental entities from the statute's scope. Moreover, the dedication did not transfer title to the property to the City. "Acceptance of a common law dedication does not pass the fee in land. The interest acquired by the municipality is generally held to be in the nature of an easement, **[*1190]** with the public having a right of user and nothing more." *Hollywood, Inc. v. Zinkil*, 403 So.2d 528, 537 (Fla. 4th DCA 1981) (quoting Note, *Dedication: Rights Under Misuser and Alienation of Lands Dedicated for Specific Municipal Purposes*, 7 U.Fla.L.Rev. 82, 83 (1954)). The City correctly asserts that a governmental entity which possesses fee simple title to property may convert the property to nonpublic uses even where the property had been originally acquired through eminent domain. *See Mainer v. Canal Authority*, 467 So.2d 989, 992-93 (Fla.1985) (once fee simple title to property taken by governmental entity, whether through condemnation, purchase, or donation, public use of property may be abandoned and property converted to different use without impairment of title). However, the rule advanced by the City does not pertain to property acquired through dedication. Although the City may ultimately build a fire station on the site through the avenue of eminent domain, it may not circumvent such a proceeding by reliance upon the dedication which does not afford the City a fee simple title.

Accordingly, we affirm the permanent injunction entered by the trial court.

Affirmed.

Table of Cases

Kramer v. City of Lakeland, 38 So.2d 126 (Fla.1948)

City of Tampa v. Hickey, 502 So.2d 1254 (Fla. 2d DCA 1986), rev. denied, 503 So.2d 327 (Fla.1987)

Hollywood, Inc. v. Zinkil, 403 So.2d 528, 537 (Fla. 4th DCA 1981)

Mainer v. Canal Authority, 467 So.2d 989, 992-93 (Fla.1985)

Pagination

* So. 2d

Majority Opinion > Table of Cases

District Court of Appeal of Florida
Third District

Fontainebleau Hotel Corp., a Florida corporation, and Charnofree Corporation, a Florida corporation, Appellants,
v.
Forty-Five Twenty-Five, Inc., a Florida corporation, Appellee.

No. 59-450.

August 27, 1959

Rehearing Denied September 23, 1959

Sibley, Grusmark, Barkdull & King, Miami Beach, for appellants.

Anderson & Nadeau, Miami, for appellee.

[*358] PER CURIAM.

This is an interlocutory appeal from an order temporarily enjoining the appellants from continuing with the construction of a fourteen-story addition to the Fontainebleau Hotel, owned and operated by the appellants. Appellee, plaintiff below, owns the Eden Roc Hotel, which was constructed in 1955, about a year after the Fontainebleau, and adjoins the Fontainebleau on the north. Both are luxury hotels, facing the Atlantic Ocean. The proposed addition to the Fontainebleau is being constructed twenty feet from its north property line, 130 feet from the mean high water mark of the Atlantic Ocean, and 76 feet 8 inches from the ocean bulkhead line. The 14-story tower will extend 160 feet above grade in height and is 416 feet long from east to west. During the winter months, from around two o'clock in the afternoon for the remainder of the day, the shadow of the addition will extend over the cabana, swimming pool, and sunbathing areas of the Eden Roc, which are located in the southern portion of its property.

In this action, plaintiff-appellee sought to enjoin the defendants-appellants from proceeding with the construction of the addition to the Fontainebleau (it appears to have been roughly eight stories high at the time suit was filed), alleging that the construction would interfere with the light and air on the beach in front of the Eden Roc and cast a shadow of such size as to render the beach wholly unfitted for the use and enjoyment of its guests, to the irreparable injury of the plaintiff; further, that the construction of such addition on the north

side of defendants' property, rather than the south side, was actuated by malice and ill will on the part of the defendants' president toward the plaintiff's president; and that the construction was in violation of a building ordinance requiring a 100-foot setback from the ocean. It was also alleged that the construction would interfere with the easements of light and air enjoyed by plaintiff and its predecessors in title for more than twenty years and "impliedly granted by virtue of the acts of the plaintiff's predecessors in title, as well as under the common law and the express recognition of such rights by virtue of Chapter 9837, Laws of Florida 1923 * * *." Some attempt was also made to allege an easement by implication in favor of the plaintiff's property, as the dominant, and against the defendants' property, as the servient, tenement.

[*359] The defendants' answer denied the material allegations of the complaint, pleaded laches and estoppel by judgment.

The chancellor heard considerable testimony on the issues made by the complaint and the answer and, as noted, entered a temporary injunction restraining the defendants from continuing with the construction of the addition. His reason for so doing was stated by him, in a memorandum opinion, as follows:

> "In granting the temporary injunction in this case the Court wishes to make several things very clear. The ruling is not based on any alleged presumptive title nor prescriptive right of the plaintiff to light and air nor is it based on any deed restrictions nor recorded plats in the title of the plaintiff nor of the defendant nor of any plat of record. It is not based on any zoning ordinance nor on any provision of the building code of the City of Miami Beach nor on the decision of any court, nisi prius or appellate. It is based solely on the proposition that no one has a right to use his property to the injury of another. In this case it is clear from the evidence that the proposed use by the Fontainebleau will materially damage the Eden Roc. There is evidence indicating that the construction of the proposed annex by the Fontainebleau is malicious or deliberate for the purpose of injuring the Eden Roc, but it is scarcely sufficient, standing alone, to afford a basis for equitable relief."

This is indeed a novel application of the maxim *sic utere tuo ut alienum non laedas*. This maxim does not mean that one must never use his own property in such a way as to do any injury to his neighbor. *Beckman v. Marshall*, Fla.1956, 85 So.2d 552. It means only that one must use his property so as not to injure the lawful *rights* of another. *Cason v. Florida Power Co.*, 74 Fla. 1, 76 So. 535, L.R.A. 1918A, 1034. In *Reaver v. Martin Theatres*, Fla.1951, 52 So.2d 682, 683, 25 A.L.R.2d 1451, under this maxim, it was stated that "it is well settled that a property owner may put his own property to any reasonable and lawful use, so long as he does not thereby deprive the adjoining landowner of any right of enjoyment of his property *which is recognized and protected by law, and so long as his use is not such a one as the law will pronounce a nuisance*." [Emphasis supplied.]

No American decision has been cited, and independent research has revealed none, in which it has been held that--in the absence of some contractual or statutory obligation--a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor. Even at common law, the landowner had no legal right, in the absence of an easement or uninterrupted use and enjoyment for a period of 20 years, to unobstructed light and air from the adjoining land. *Blumberg v. Weiss*, 1941, 129 N.J.Eq. 34, 17 A.2d 823; 1 Am.Jur.,

Adjoining Landowners, *§ 51*. And the English doctrine of "ancient lights" has been unanimously repudiated in this country. 1 Am.Jur., Adjoining Landowners, *§ 49*, p. 533; *Lynch v. Hill*, 1939, 24 Del.Ch. 86, 6 A.2d 614, overruling *Clawson v. Primrose*, 4 Del.Ch. 643.

There being, then, no legal right to the free flow of light and air from the adjoining land, it is universally held that where a structure serves a useful and beneficial purpose, it does not give rise to a cause of action, either for damages or for an injunction under the maxim *sic utere tuo ut alienum non laedas*, even though it causes injury to another by cutting off the light and air and interfering with the view that would otherwise be available over adjoining land in its natural state, regardless of the fact that the structure may have been erected partly for spite. See the cases collected in the annotation in *133 A.L.R. at pp. 701* et seq.; 1 Am.Jur., Adjoining Landowners, *§ 54*, p. 536; *Taliaferro v. Salyer*, 1958, 162 Cal.App.2d 685, 328 P.2d 799; **[*360]** *Musumeci v. Leonardo*, 1950, 77 R.I. 255, 75 A.2d 175; *Harrison v. Langlinais*, Tex.Civ.App.1958, 312 S.W.2d 286; *Granberry v. Jones*, 1949, 188 Tenn. 51, 216 S.W.2d 721; *Letts v. Kessler*, 1896, 54 Ohio St. 73, 42 N.E. 765; *Kulbitsky v. Zimnoch*, 1950, 196 Md. 504, 77 A.2d 14; *Southern Advertising Co. v. Sherman*, Tenn.App.1957, 308 S.W.2d 491.

We see no reason for departing from this universal rule. If, as contended on behalf of plaintiff, public policy demands that a landowner in the Miami Beach area refrain from constructing buildings on his premises that will cast a shadow on the adjoining premises, an amendment of its comprehensive planning and zoning ordinance, applicable to the public as a whole, is the means by which such purpose should be achieved. (No opinion is expressed here as to the validity of such an ordinance, if one should be enacted pursuant to the requirements of law. Cf. *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, Fla.App.1959, 108 So.2d 614, 619; certiorari denied, Fla.1959, 111 So.2d 437.) But to change the universal rule--and the custom followed in this state since its inception--that adjoining landowners have an equal right under the law to build to the line of their respective tracts and to such a height as is desired by them (in the absence, of course, of building restrictions or regulations) amounts, in our opinion, to judicial legislation. As stated in *Musumeci v. Leonardo*, *supra* [77 R.I. 255, 75 A.2d 177], "So use your own as not to injure another's property is, indeed, a sound and salutary principle for the promotion of justice, but it may not and should not be applied so as gratuitously to confer upon an adjacent property owner incorporeal rights incidental to his ownership of land which the law does not sanction."

We have also considered whether the order here reviewed may be sustained upon any other reasoning, conformable to and consistent with the pleadings, regardless of the erroneous reasoning upon which the order was actually based. See *McGregor v. Provident Trust Co. of Philadelphia*, 119 Fla. 718, 162 So. 323. We have concluded that it cannot.

The record affirmatively shows that no statutory basis for the right sought to be enforced by plaintiff exists. The so-called Shadow Ordinance enacted by the City of Miami Beach at plaintiff's behest was held invalid in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra. It also affirmatively appears that there is no possible basis for holding that plaintiff has an easement for light and air, either express or implied, across defendants' property, nor any prescriptive right thereto--even if it be assumed, arguendo, that the common-law right of prescription as to "ancient lights" is in effect in this state. And from what we have said heretofore in this opinion, it is perhaps superfluous to add that we have no desire to dissent from the unanimous holding in this

country repudiating the English doctrine of ancient lights.

The only other possible basis--and, in fact, the only one insisted upon by plaintiff in its brief filed here, other than its reliance upon the law of private nuisance as expressed in the maxim *sic utere tuo ut alienum non laedas*--for the order here reviewed is the alleged violation by defendants of the setback line prescribed by ordinance. The plaintiff argues that the ordinance applicable to the Use District in which plaintiff's and defendants' properties are located, prescribing "a front yard having a depth of not less than one hundred (100) feet, measured from the ocean, * * *," should be and has been interpreted by the City's zoning inspector as requiring a setback of 100 feet from an established ocean bulkhead line. As noted above, the addition to the Fontainebleau is set back only 76 feet 8 inches from the ocean bulkhead line, although it is 130 feet from the ocean measured from the mean high water mark.

[*361] While the chancellor did not decide the question of whether the setback ordinance had been violated, it is our view that, even if there was such a violation, the plaintiff would have no cause of action against the defendants based on such violation. The application of simple mathematics to the sun studies filed in evidence by plaintiff in support of its claim demonstrates conclusively that to move the existing structure back some 23 feet from the ocean would make no appreciable difference in the problem which is the subject of this controversy. Cf. *Taliaferro v. Salyer*, supra. The construction of the 14-story addition is proceeding under a permit issued by the city pursuant to the mandate of this court in *City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp.*, supra, which permit authorizes completion of the 14-story addition according to a plan showing a 76-foot setback from the ocean bulkhead line. Moreover, the plaintiff's objection to the distance of the structure from the ocean appears to have been made for the first time in the instant suit, which was filed almost a year after the beginning of the construction of the addition, at a time when it was roughly eight stories in height, representing the expenditure by defendants of several million dollars. In these circumstances, it is our view that the plaintiff has stated no cause of action for equitable relief based on the violation of the ordinance--assuming, arguendo, that there has been a violation.

Since it affirmatively appears that the plaintiff has not established a cause of action against the defendants by reason of the structure here in question, the order granting a temporary injunction should be and it is hereby reversed with directions to dismiss the complaint.

Reversed with directions.

HORTON, C. J., and CARROLL, CHAS., J., and CABOT, TED, Associate Judge concur.

Table of Cases

Beckman v. Marshall, Fla.1956, 85 So.2d 552

Cason v. Florida Power Co., 74 Fla. 1, 76 So. 535, L.R.A. 1918A, 1034

Reaver v. Martin Theatres, Fla.1951, 52 So.2d 682, 683, 25 A.L.R.2d 1451

Blumberg v. Weiss, 1941, 129 N.J.Eq. 34, 17 A.2d 823

Lynch v. Hill, 1939, 24 Del.Ch. 86, 6 A.2d 614

Clawson v. Primrose, 4 Del.Ch. 643

Taliaferro v. Salyer, 1958, 162 Cal.App.2d 685, 328 P.2d 799

Musumeci v. Leonardo, 1950, 77 R.I. 255, 75 A.2d 175

Harrison v. Langlinais, Tex.Civ.App.1958, 312 S.W.2d 286

Granberry v. Jones, 1949, 188 Tenn. 51, 216 S.W.2d 721

Letts v. Kessler, 1896, 54 Ohio St. 73, 42 N.E. 765

Kulbitsky v. Zimnoch, 1950, 196 Md. 504, 77 A.2d 14

Southern Advertising Co. v. Sherman, Tenn.App.1957, 308 S.W.2d 491

City of Miami Beach v. State ex rel. Fontainebleau Hotel Corp., Fla.App.1959, 108 So.2d 614, 619; certiorari denied, Fla.1959, 111 So.2d 437

McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323

Pagination

* So.3d

** BL

Opinion > Concurring Opinion >

District Court of Appeal of Florida, Third District.

The VILLAGE OF PALMETTO BAY, Florida, Petitioner, v. PALMER TRINITY PRIVATE SCHOOL, INC., Respondent.

No. 3D12-190.

July 5, 2012.

Appeal from the Circuit Court, Miami-Dade County, Appellate Division, Joel H. Brown, C.J., Joseph Farina and Norma Lindsey, JJ.

[*20] White & Case, Raoul G. Cantero, Evan M. Goldenberg and Elizabeth Coppolecchia; Figueredo & Boutsis and Eve A. Boutsis, for petitioner; W. Tucker Gibbs, for Intervenor, Concerned Citizens of Old Cutler.

Bilzin Sumberg Baena Price & Axelrod, Stanley B. Price, Eileen Ball Mehta and Eric Singer, for respondent.

Before WELLS, C.J., and LAGOA, J., and SCHWARTZ, Senior Judge.

WELLS, Chief Judge.

The Village of Palmetto Bay petitions for certiorari relief from an order of the circuit court appellate division granting a motion to enforce its mandate in *Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, *18 Fla. L. Weekly Supp. 342a* (Fla. 11th Jud.Cir.Ct. Feb. 11, 2011).[fn1] Both Palmetto Bay and Palmer Trinity maintain, and we agree, that this order is subject to "first tier" certiorari review. *See Ramirez v. United Auto. Ins. Co.*, 67 So.3d 1174, 1175-76 (Fla. 3d DCA 2011) (confirming that a "first ruling on [a] question" by an appellate division of a circuit court is properly reviewed by the district court as a "first tier" appellate review); *see also City of Indian Rocks Beach v. Tomalo*, 834 So.2d 341, 341 (Fla. 2d DCA 2003) (treating a petition for second tier certiorari review of an order enforcing a circuit court appellate division mandate as an appeal).

To justify certiorari relief, a petition must demonstrate a departure from the essential requirements of law resulting in a material injury that cannot be remedied on appeal. *See Fortune Int'l Hospitality, LLC v. M. Resort Residences Condo. Ass'n*, 77 So.3d 741, 743 (Fla. 3d DCA 2011) (citing *Martin-Johnson, Inc. v. Savage*, 509 So.2d 1097 (Fla.1987)). A departure from the essential requirements of the law that will justify issuance of this extraordinary writ requires significantly more than a demonstration of legal error:

[T]he departure from the essential requirements of the law necessary for the issuance of a writ of certiorari is something more than a simple legal error. A district court should exercise its discretion to grant certiorari review ***only*** when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Allstate Ins. Co. v. Kaklamanos, 843 So.2d 885, 889 (Fla.2003) (citing *Ivey v. Allstate Ins. Co.*, 774 So.2d 679, 682 (Fla.2000)).

[*21]

As Chief Justice Boyd made clear in *Jones v. State*, 477 So.2d 566, 569 (Fla.1985) (Boyd, C.J., concurring specially):

The required "departure from the essential requirements of law" means something far beyond legal error. It means an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice. The writ of certiorari properly issues to correct essential illegality but not legal error.

*See also Haines City Cmty. Dev. **[**2]** v. Heggs*, 658 So.2d 523, 527-28 (Fla.1995) (observing that Chief Justice Boyd in *Jones* had "captured the essence of the standard" for determining whether a departure from the essential requirements of the law existed).

Under these parameters, the order of the circuit court appellate division granting Palmer Trinity's motion to enforce its prior mandate neither merits nor permits issuance of the writ sought. The circuit court appellate division did no more than order compliance with its now long final decision in *Palmer Trinity Private School, Inc.*, 18 Fla. L. Weekly Supp. at 342a. There is no question that it is within the circuit court's authority to enforce its decisions and orders. *See Blackhawk Heating & Plumbing Co. v. Data Lease Fin. Corp.*, 328 So.2d 825, 827 (Fla.1975) (observing generally that a court may "take any steps or issue any appropriate writ necessary to give effect to its judgment"). The order itself does not then constitute a departure from the essential requirements of the law.

The compliance mandated by the order also does not constitute a departure from the essential requirements of the law. The order (or opinion) being enforced here struck portions of a zoning resolution addressing Palmer Trinity's special exception request to expand its school and to increase its student enrollment from 600 to 1150 students. The resolution being reviewed "approved" Palmer Trinity's special exception request for an increase in its student enrollment to 1150 but then limited that approval to permit only 900 students:

Section 4. *Order.*

A. ***The Council***, pursuant to *section 33-311(A)(7)*, and 33-151, et seq., of the Miami Dade County Code as applied by the Village, ***approves with conditions*** . . . ***Applicants request[] for a special exception*** . . . ***for*** . . . [an increase in] ***number of students [to 1150] as to the plans entitled*** Palmer Trinity School Campus Master Plan. . . .

B. The Village Council ***conditions*** . . . ***the special exception as follows:***

. . . .

3. The request to increase the non-public school number of students to *1150 is denied.* The condition to allow expansion to 900 students is granted.

(Resolution No. 2010-48 adopted May 17, 2010) (some emphasis added).

In a thorough and well reasoned opinion on first tier certiorari review, the appellate division of the circuit court struck the 900 student condition or "cap" leaving approval of the 1150 special exception request standing:

(PER CURIAM) This appeal arises out of the adoption of Zoning Resolution No. 2010-48 (the "Resolution") by the Village of Palmetto Bay (the "Village"). Petitioner, Palmer Trinity Private School, Inc. ("Palmer Trinity"), seeks by way of certiorari review to quash and remove two provisions incorporated into Condition 4.4 of the Resolution, specifically: (1) the cap on the permissible number of students at the school at 900; and (2) the imposition of a thirty-year (30) prohibition on the filing of any applications **[*22]** for development approvals on the school's 55-acre site. We have jurisdiction pursuant to Article *V*, Section 5, Florida Constitution, and Rules 9.030(c) and 9.100 of the Florida Rules of Appellate Procedure.

Palmer Trinity argues that the above provisions are unlawful and should be quashed and removed from the **[**3]** Resolution in that: (1) the cap on the number of students permitted at the school was arbitrary, not supported by competent substantial evidence, and departed from the essential requirements of law; and (2) the thirty-year prohibition on future development applications violated Palmer Trinity's due process rights because it constituted a de facto moratorium for which neither notice nor opportunity to be heard was given, that the Village departed from the essential requirements of law in approving the prohibition, and that the Village failed to support the thirty-year prohibition with substantial competent evidence.

The Village disagrees and seeks to dismiss Palmer Trinity's Petition. For the reasons set forth below; we QUASH the two provisions contained in the Resolution, as set forth above, adopted by the Village and REMAND to the Village with instructions to conduct further proceedings on this matter in accordance with this decision.

Procedural and Factual Background

Palmer Trinity has owned and operated a private school on 22.5 acres of land [now] located within the Village ("Parcel A") for almost five decades. In 1988, Palmer Trinity applied for and obtained approval of a modification of its site plan for the purpose of increasing its enrollment to 600 students. In 2003, Palmer Trinity purchased an additional 32.5 acres also located within the Village ("Parcel B") that was zoned half Agricultural ("AU") and half Estate Single Family per Five Acres ("EU-2"). Parcel B had an Estate Density Residential ("EDR") future

land use designation, allowing for less than 2.5 dwelling units per acre. In 2006, Palmer Trinity filed an application (the "Application") under the Miami-Dade County Code to rezone Parcel B to Estate Modified Single Family allowing for one home per 15,000 square feet ("EU-M"). As part of the Application, Palmer Trinity also sought a special exception to increase the student enrollment from 600 to 1400 and certain variances concerning further development on both Parcel A and B. As a result of the incorporation of the Village as a municipality, the Application was transferred from the County to the Village.

In 2008, the Village held a hearing on the Application. Consideration of the rezoning request was bifurcated from the other requests in the Application. At the 2008 hearing, the Village adopted Ordinance 08-06 denying the requested rezoning. Palmer Trinity appealed this denial in a petition for certiorari review to the Circuit Court, acting in its appellate capacity, which upheld, without opinion, the Village's decision. Palmer Trinity then took an appeal to the Third District Court of Appeal which reversed the Circuit Court, thereby overturning the Village's denial of the rezoning request. *See Palmer Trinity Private School, Inc. v. Village of Palmetto Bay*, 31 So.3d 260 (Fla. 3d DCA 2010) [35 Fla. L. Weekly D672b] ("*Palmer I*").

After the Third District issued the decision in *Palmer I*, Palmer Trinity revised its plans, eliminating some of the previously requested non-use variances and reducing its requested student enrollment **[**4]** from 1400 to 1150. Palmer Trinity also voluntarily offered to expand its **[*23]** student population from 600 to 1150 in gradual increments over a fifteen year period. In addition, the proposed site plan was modified to reflect the reduced student enrollment request of 1150, the proposed new development on Parcel B was redesigned and relocated toward the center, setbacks were increased and additional landscaping was added.

On April 28, 2010, the Village conducted a public hearing on the first reading of the rezoning component of the Application. On May 4, 2010, the Village conducted a public hearing on second reading of the rezoning request and approved the rezoning by adopting Ordinance 2010-09. Also at that hearing, the Village heard the request for the special exceptions and site plan modification components of the Application. Prior to the hearing, the professional staff of the Village (the "Village Staff) reviewed the Application and recommended approval with certain conditions (the "Recommendation"). The . . . ***Village Staff specifically recommended that Palmer Trinity's request for a special exception to expand the school onto Parcel B and to increase the student enrollment from 600 to 1150 be approved.*** The 900 number, which the Village later adopted, was not mentioned in the Recommendation.

. . . .

At the May 4, 2010 hearing, the Village's Planning Director (the "Director") presented the Recommendation. . . . With respect to the 1150 student cap on enrollment, the ***Village's expert traffic consultant, Joseph Corradino, reviewed the traffic study included in Palmer Trinity's Application and recommended approval, finding that, based on 1150 students***, the Application satisfied the relevant traffic level of service standards.

. . . .

The Village Attorney presented an Overview of Zoning Law as a guide to the Village Council. The County Manager also engaged special council who addressed the Village Council regarding their duties and

obligations as quasi-judicial officers. The attorney for Concerned Citizens of Old Cutler, Inc. ("CCOCI") and Betty Ingram, Intervenors, presented argument and testimony from several individuals and introduced, Mr. Mark Alvarez, a planner, as an expert. Other individual witnesses spoke both for and against the Application. The Village Council then allowed Palmer Trinity an opportunity for rebuttal.

At the conclusion of the evidentiary portion of the hearing, the Village Council began its deliberations. Several amendments to the conditions recommended by the Village Staff were made. ***Council Person Stanczyk made a motion to reduce the number of students permitted to 900. This was the first time the number 900 was ever mentioned at the public hearing or in the entire record preceding the public hearing.*** Thereafter, the Mayor and Council Person Stanczyk had a brief discussion as to whether the 900 number was arbitrary. At the conclusion of the hearing on May 4, 2010, the Village adopted the Resolution with conditions, including the reduction in the number of students from 1150 to 900, with Council **[**5]** Member Stanczyk voting against. The only modification to the language of the version of Condition 4.4 contained in the Recommendation to the language in the version of Condition 4.4, as included in the Resolution, was the reduction in the number of students permitted from 1150 to 900. . . .

Subsequent to the Village's adoption of the Resolution, Palmer Trinity filed its **[*24]** timely Petition to invoke this Court's jurisdiction.

Conclusions of Law

First tier certiorari review of a quasi-judicial zoning decision, such as the Resolution at issue here, is a matter of right. *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195, 198 (Fla.2003). A three-part standard governs this Court's review: (1) whether procedural due process is accorded; (2) whether the essential requirements of law have been observed; and (3) whether the administrative findings and judgment are supported by competent substantial evidence. *Id.* at 199.

. . . .

B. The 900 Student Cap on Enrollment

Palmer Trinity argues that the 900 student cap contained in Condition 4.4 of the Resolution is not supported by competent substantial evidence and constitutes a departure from the essential requirements of law. We agree. The record contains no mention of the 900 number at the May 4, 2010 hearing until after the close of public comment when the Mayor, Council, and Village Counsel had the following exchange:

COUNCIL MEMBER STANCZYK: Yeah and I'm having a little trouble again. The original student number that was listed as a recommendation was 1150, and I would like to reduce it to 900, staged incrementally over the entire term of the project. I'd like to make that as a motion.

MAYOR FLINN: That's a tough one. I mean, I don't know how we can just arbitrarily do that, but —

COUNCIL MEMBER STANCZYK: Well, 1150 was an arbitrary number.

MAYOR FLINN: Well, 1150 is what they voluntarily dropped to, but —

COUNCIL MEMBER STANCZYK: Well —

MAYOR FLINN: But, anyway, is there a second for that?

VICE MAYOR PARISER: I'll second it.

MAYOR FLINN: All right, it's been seconded. Any discussions on it?

COUNCIL MEMBER FELLER: Read the motion.

MAYOR FLINN: Reduce to 900 students.

COUNCIL MEMBER FELLER: In discussion by — I had gotten a number, by state number or by density or some numbers. Theoretically, what is the maximum the school would be allowed to by the total acreage? Is there such a thing, Eve?

MS. BOUTSIS: Under the special exception process, they have to meet certain numbers. The answer is over 2,000.

COUNCIL MEMBER FELLER: It's over 2,000.

MAYOR FLINN: I think it was 2100 at one point. All right all in favor indicate by saying aye.

COUNCIL MEMBERS: Aye.

MAYOR FLINN: Any opposed?

COUNCIL MEMBER FELLER: Nay.

COUNCIL MEMBER TENDRICH: Nay.

MAYOR FLINN: Three/two. All right next item.

See Transcript of May 4, 2010, Hearing at pp. 297:16-299:12.

The Village relies upon the testimony of Mr. Mark Alvarez, the planner retained by the Intervenors, and the comments by neighboring residents with respect to traffic and noise. The only specific testimony **[*25]** offered by Mr. Alvarez' [sic] that could arguably support the Village's position is his statement that "[t]he school, and what I'm going to point out, is I believe **[**6]** that the use, as a school, is not consistent with what the Village's comprehensive plan says." *See* May 4, 2010 Hearing Transcript at p. 168. He further testified that school would be "increasing the population density of Parcel B well above "what's expected for that zoning category." *Id. at 183:7-17*. Palmer Trinity contends that Mr. Alvarez' testimony does meet the standard for competent substantial evidence.

The Florida Supreme Court has defined competent substantial evidence as follows:

Substantial evidence has been described as such evidence as will establish a substantial basis of fact from

which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial evidence should also be 'competent.'

De Groot v. Sheffield, 95 So.2d 912, 916 (Fla.1957).

An applicant seeking a special exception must demonstrate to the decision-making body that its proposal is consistent with the county's land use plan; that the uses are specifically authorized in the applicable zoning district; and that the requests meet with the applicable zoning code standards of review. *See Jesus Fellowship v. Miami-Dade County, Florida*, 752 So.2d 708, 710.[sic] (Fla. 3d DCA 2000). If an applicant meets this burden, then the request must be granted unless the opponent carries its burden to demonstrate that the applicant's request does not meet the standards and are in fact adverse to the public interest. *Id.*

The facts herein are analogous to those presented in *Jesus Fellowship.* In that case, the Third District quashed a circuit court decision which affirmed a decision of the Miami-Dade County Commission denying a portion of a church's zoning application. In the zoning application at issue therein, the church sought to re-zone land in a residential area to permit expansion of the church's religious facilities and to permit a private school and day care center. Although the County Staff had recommended approval of 524 students, the Commission approved the rezoning but limited the number of students to 150 as a result of a "suggestion" by the opponents' attorney after the close of the evidentiary hearing.

Here, as in *Jesus Fellowship*, the first mention of even the reduction in the number of students permitted occurred after the close of the evidentiary portion of the public hearing. And like the "suggestion" by the opponent's counsel in *Jesus Fellowship*, the 900 number here materialized in the form of a motion for which no discussion on the record had been had nor foundation had been laid. Other than the brief discussion **[**7]** between the Mayor and Council Person Stanczyk, wherein the 900 number was admittedly arbitrary, there is no mention of that number, nor any mathematical **[*26]** calculation from which it could have been derived, contained in either the record or transcript preceding the adoption of the Resolution. Neither the testimony of Mr. Alvarez, nor of any of the individuals living in the neighborhood surrounding the school, provides a competent substantial basis for the 900 student cap on enrollment. Accordingly, this Court holds that the 900 student cap is not supported by competent substantial evidence. For the reasons set forth above, the provisions contained in Resolution 2010-48 relating to the . . . 900 student cap on enrollment are QUASHED and this matter is REMANDED to the Village of Palmetto Bay for proceedings in accordance with this decision.

Palmer Trinity Private Sch., Inc., 18 Fla. L. Weekly Supp. at 342a (some emphasis added).

Palmetto Bay correctly sought no second tier review of this decision. Palmetto Bay applies the Miami-Dade County Zoning Code to special exception requests. *See Palmer Trinity Private Sch, Inc. v. Vill. of Palmetto Bay* , 31 So.3d 260, 263 n. 2 (Fla. 3d DCA 2010) ("The Village's Planning and Zoning Powers Ordinance states that '[c]hapter 33 of the Miami-Dade Code entitled 'Zoning' . . . shall be applied within the municipal boundaries of

the Village of Palmetto Bay. . . .' *See § 31-1(d)* of the Village of Palmetto Bay Planning and Zoning Powers Ordinance."). In *Metropolitan Dade County v. Fuller*, 497 So.2d 1322, 1322 (Fla. 3d DCA 1986), this court confirmed that under the Miami-Dade County Code a special exception request "is subject only to the test enunciated in *section 33-311(d)* [now *section 33-311(A)(3)*] of the [Miami-Dade County] Code, which is essentially whether the proposal serves the public interest." (Footnote omitted). An application satisfies this requirement once consistency with a zoning authority's land use plan and code criteria have been demonstrated. Once this burden is met, "the application must be granted unless the opposition carries its burden, which is to demonstrate [by competent, substantial evidence] that the applicant's request[does] not meet the standards and are in fact adverse to the public interest." *Jesus Fellowship, Inc. v. Miami-Dade Cnty.*, 752 So.2d 708, 709 (Fla. 3d DCA 2000); *see Irvine v. Duval Cnty. Planning Comm'n*, 495 So.2d 167, 167 (Fla.1986) ("[O]nce the petitioner met the initial burden of showing that his application met the statutory criteria for granting such exceptions, 'the burden was upon the Planning Commission to demonstrate, by competent substantial evidence presented at the hearing and made a part of the record, that the [special] exception requested by petitioner did not meet such standards and was, in fact, adverse to the public interest.'" (quoting *Irvine v. Duval Cnty. Planning Comm'n*, 466 So.2d 357, 364 (Fla. 1st DCA 1985) (Zehmer, J., dissenting))); *City of Hialeah Gardens v. Miami-Dade Charter Found, Inc.*, 857 So.2d 202, 204 (Fla. 3d DCA 2003) ("Once a special exception applicant demonstrates consistency with a zoning authority's land use plan and meet code criteria, the decision-making body may deny the request only where 'the party opposing the application . . . show[s] by competent **[**8]** substantial evidence that the proposed exception does not meet the published criteria.'" (quoting *Fla. Power & Light Co. v. City of Dania*, 761 So.2d 1089, 1092 (Fla.2000))).

There is no dispute that Palmer Trinity met its burden of demonstrating compliance with the standards imposed by the Miami-Dade County Zoning Code for securing a special exception. As the circuit court noted in its opinion, prior to the public hearing on Palmer Trinity's special exception request, Palmetto Bay's professional **[*27]** staff reviewed Palmer Trinity's request for compliance and "specifically recommended . . . Palmer Trinity's request for a special exception to expand the school onto Parcel B and to increase the student enrollment from 600 to 1150." *Palmer Trinity Private Sch., Inc.*, 18 Fla. L. Weekly Supp. at 342a. This recommendation came after a thorough thirty-nine page review of all applicable criteria and constitutes competent substantial evidence establishing that the request serves the public interest. *See City of Hialeah Gardens*, 857 So.2d at 205 (confirming that the testimony of professional staff, when based on "professional experiences and personal observations, as well as [information contained in an] application, site plan, and traffic study" constitutes competent substantial evidence); *Palm Beach Cnty. v. Allen Morris Co.*, 547 So.2d 690, 694 (Fla. 4th DCA 1989) (confirming that professional staff reports analyzing a proposed use constituted competent substantial evidence); *Metro. Dade Cnty. v. Fuller*, 515 So.2d 1312, 1314 (Fla. 3d DCA 1987) (stating that staff recommendations constituted evidence); *Dade Cnty. v. United Res., Inc.*, 374 So.2d 1046, 1050 (Fla. 3d DCA 1979) (confirming that the recommendation of professional staff "is probative").

Based on this record, the burden shifted to the opponents of the request to introduce competent substantial evidence demonstrating that the application for 1150 students "did not meet [the] standards and was, in fact, adverse to the public interest." *Irvine*, 495 So.2d at 167; *City of Hialeah Gardens*, 857 So.2d at 206. As the circuit court expressly found, no such evidence was adduced. In fact, the circuit court concluded that the testimony of the only competent witness to testify in opposition to the request, Mr. Alvarez, did not testify as to

whether the 1150 student request was adverse to the public interest. Rather he testified only that he believed that the "*use*" of the property as a school was not consistent with Palmetto Bay's comprehensive plan and that the school would increase the population density of the parcel involved above that allowed. Use of the property for a school is not at issue here since no one claims it is not a permitted use. And in light of Council Member Feller and Mayor Flinn's concession at the commission hearing that the regulations governing this parcel would allow up to 2100 students, it is clear that the circuit court's conclusion that his testimony was not substantially related to the issue was correct.

Based on this record, the circuit court clearly was correct in striking the 900 student "cap." Under our ruling in *Jesus Fellowship, Inc.*, 752 So.2d at 711, it also had no choice but to strike the restriction, leaving intact Palmer Trinity's **[**9]** entitlement to a special exception allowing 1150 students. There, as here, an applicant (a church) sought a special exception for a private school and a day care center for a specific number of students (524) but was restricted by the county commission to fewer students (150). There, as here, professional staff recommended approval of the request. There, as here, neighbors and a professional engineer appeared to oppose the request. There, as here, the opposition witness testimony, proved not to be competent substantial evidence on the issue of the church's student request. There, as here, removal of the unsupported condition mandated approval of the evidentiary-supported request:

In summary, the Church presented sufficient evidence to carry its burden; the objectors presented only testimony and documents that support the Church's application or which the courts have held not to be evidence. When the circuit court decided there was ***evidence*** (substantial, competent) to support the **[*28]** Commission's denial of the application, it failed to apply the correct law as to the granting or denial of special exceptions and unusual uses, and failed to apply the correct law as to what constitutes competent evidence in such cases. As a result we quash the circuit court's order and remand the case with instructions to the circuit court to direct the Commission to remove the limitation to K-6 and 150 students and to grant the application with grades K-12 and 524 students.

Id. at 711 (footnote omitted).

The special exception for 1150 students should, therefore, have been summarily enforced by Palmetto Bay. Despite the circuit court's citation to and reliance on *Jesus Fellowship*, which required approval of Palmer Trinity's 1150 student request, and its mandate, Palmetto Bay remained intransigent. On remand, Palmetto Bay decided to reconsider the application from scratch. On April 12, 2011, Palmer Trinity sought to preclude such action, filing a motion to enforce mandate in the circuit court. On May 5, 2011, the same three-judge circuit court panel which heard the underlying appeal granted the motion. Palmetto Bay then sought clarification of the order enforcing the mandate, contending that it believed that it was being ordered to "hold a public hearing, the record of which shall include but not be limited to all the evidence already in the record for a final decision as to the entire application — not just as to the two items litigated on appeal." On June 1, 2011, the same three-judge circuit court panel rejected this notion ordering Palmetto Bay to remove the "cap" on the number of students requested and to take no further action inconsistent with its May 5, 2011 order and its present order, effectively precluding additional hearings and mandating approval of the 1150 request. This did not happen.

Again on July 12, 2011, Palmer Trinity filed a Renewed Emergency Motion to Enforce Mandate or Alternatively, to Enjoin and Prohibit Respondent from Violating the Express Mandate of [the] Court, wherein it argued that Palmetto Bay intended to violate the court's **[**10]** orders at a public hearing scheduled for July 19, 2011. That emergency motion was denied. On July 19, 2011, Palmetto Bay held a public hearing and adopted Resolution 2011-53, amending and incorporating Resolution 2010-48, interpreting each of the circuit court's prior determinations and rulings to mean that since Palmetto Bay had rejected the 1150 student enrollment requested in favor of a 900 student "cap," and that cap had now been rejected, no increase in student enrollment above the existing 600 students would be allowed. Thereafter, on August 26, 2011, Palmer Trinity filed the Motion to Enforce Mandate, or in the Alternative for Extraordinary Relief, which resulted in the December 22, 2011 order here under review. In that order, the same three-judge panel of the Eleventh Judicial Circuit Court Appellate Division once again ordered enforcement of its mandate in *Palmer Trinity Private School, Inc.*, 18 Fla. L. Weekly Supp. at 342a. This time the court clearly stated that "in order to strictly adhere to the Mandate's plain language, the Village must remove or otherwise render ineffectual all of the provisions in the Amended Resolution which have the effect of reducing the maximum number of students allowed from 1150 to 900 or to below 900." This conclusion is expressly predicated on the court's extensive quotation from and reliance on *Jesus Fellowship*; on its conclusion that there is no dispute that Palmer Trinity's request for 1150 students was "approved . . . with a condition that capped student enrollment at 900"; and that removal of the cap entitled Palmer Trinity to approval of its 1150 student request. **[*29]** These conclusions are fully supported by the record and applicable law and do not in any manner depart from the essential requirements of the law.

Conclusion

In sum, Palmer Trinity sought a special exception which would permit expanding its student enrollment to 1150. At the public hearing which followed, Palmer Trinity adduced competent substantial evidence to support its 1150 student request; no competent substantial evidence was submitted to support either denying or limiting the school's enrollment request. Palmetto Bay nonetheless denied the 1150 number, lowered the acceptable number to 900 students, and granted the exception. Based on its finding of the lack of competent substantial evidence supporting a "cap" below 1150, the circuit court appellate division ordered the limitation deleted. Palmetto Bay claimed that its compliance with that ruling required only that it delete the 900 student figure, making it free to leave its "denial" of special exception for 1150 students in place. A simple straight forward reading of the circuit court's ruling contradicts that conclusion. When Palmetto Bay amended Resolution 2010-48, on July 19, 2011, that resolution should have reflected acceptance and incorporation of the circuit court's decision rejecting any "cap" below 1150. In other words, Palmetto Bay is wrong in arguing its denial of the special exception for 1150 students could remain in place **[**11]** after the circuit court's February 11, 2011 ruling. Palmetto Bay's denial of the special exception for 1150 students should have been excised from its Amended Resolution, just as was the 900 student "cap." Any other interpretation of the circuit court's February 11, 2011 ruling amounted to wishful thinking at best, and more likely a willful disobedience of that court's instructions. The circuit court's order enforcing its earlier mandate was therefore entirely proper and in no way justifies the issuance of the writ sought herein.

For these reasons, the petition for writ of certiorari is denied.

[fn1] The order On Motion to Enforce Mandate or in the Alternative, for Extraordinary Relief was issued on December 22, 2011.

SCHWARTZ, Senior Judge (concurring).

Although I had (and have) some misgivings about the posture in which this case presents itself, Chief Judge Wells' opinion has convinced me that, as often happens, any departure from the procedural niceties which may have occurred makes no difference. As her opinion demonstrates, on the basis of what was presented to the Commission, it had no option under the law but to grant the special exception in full. *See Irvine v. Duval Cnty. Planning Comm'n*, 495 So.2d 167, 167 (Fla.1986) ("[W]e agree with Judge Zehmer (dissenting) that once the petitioner met the initial burden of showing that his application met the statutory criteria for granting such exceptions, 'the burden was upon the Planning Commission to demonstrate, by competent substantial evidence presented at the hearing and made a part of the record, that the [special] exception requested by petitioner did not meet such standards and was, in fact, adverse to the public interest.'"); *Jesus Fellowship, Inc. v. Miami-Dade Cnty.*, 752 So.2d 708, 709 (Fla. 3d DCA 2000); *Metro. Dade Cnty. v. Fuller*, 497 So.2d 1322 (Fla. 3d DCA 1986).

In essence, therefore, everything in the circuitous legal journey which followed was an exercise in superfluousness and futility. Since the effect of the order now under review, however fashioned, was to require what was required from the beginning, I concur in denying the petition.

Counties -- Zoning -- Unusual use -- County commission's denial of application for unusual use permit to establish day nursery in single family residence not supported by competent substantial evidence -- Testimony from neighbors which was, as a whole, expression of generalized fears and opinions rather than fact-based testimony, not basis for denying permit -- Applicant met initial burden of proving compliance with provisions of county code relating to daycare centers -- Fact that proposed use was commercial, for-profit use does not require different finding that use was incompatible with surrounding neighborhood

YOLANDA CANIZARES, Appellant, vs. METROPOLITAN DADE COUNTY, Appellee. 11th Judicial Circuit in and for Dade County, Appellate Division. Case No. 96-197AP. Opinion filed June 6, 1997. An Appeal from Dade County Commission, in and for Dade County. Counsel: Stanley B. Price and Eileen Ball Mehta, for Appellant. Robert A. Ginsburg, Dade County Attorney and Jay W. Williams, Assistant County Attorney, for Appellee.

(Before MURRAY GOLDMAN, MARGARITA ESQUIROZ, MICHAEL CHAVIES, JJ.)

(PER CURIAM.) Appellant seeks review of Metropolitan Dade County Resolution No. Z-62-96. The Appellee, Metropolitan Dade County Board of County Commission (hereinafter Commission), denied Appellant's application for an unusual use permit to establish a day nursery. The proposed site is a single family residence located at the intersection of S.W. 137th Ave. and S.W. 13th St. Appeal to this court is made pursuant to §33-316 of the Dade County Code. We grant certiorari and reverse.

Appellant Yolanda Canizares (hereinafter Petitioner) filed a petition for an unusual use permit to establish a day nursery in a residential area at the intersection of S.W. 137th Ave. and S.W. 13th St. The appropriate county agencies reviewed the petition and recommended approval. Some neighbors in the area objected to the Petition. After a hearing, the Zoning Appeals Board granted Petitioner's request. The neighbors appealed. Again the county agencies recommended approval of the application.

The matter came before the County Commission which overturned the Zoning Appeals Board, and denied Petitioner's application. The Commission's Resolution stated:

> the requested unusual use . . . would not be compatible with the area and its development and would not be in harmony with the general purpose and intent of the regulations and would not conform with the requirements and intent of the Zoning Procedure Ordinance, and that the requested unusual use would have an adverse impact upon the public interest, and should be denied without prejudice.

(R. p. 144).

Petitioner appeals claiming that the Commission's decision lacked substantial competent evidence.

When the Circuit Court, acting in its appellate capacity, reviews a local administrative agency decision, it must determine:

(a) Whether procedural due process was accorded;

(b) Whether the essential requirements of law have been observed; and

(c) Whether administrative findings and judgments are supported by substantial competent evidence. *Haines City Community Development v. Heggs,* 658 So. 2d 523, 530 (Fla. 1995); *City of Deerfield Beach v. Vaillant,* 419 So. 2d 624, 626 (Fla. 1982). The Circuit Court is not entitled to reweigh the evidence or substitute its judgment for that of the agency. *Heggs,* 658 So. 2d at 530 (*citing Educational Development Center v. City of West Palm Beach*, 541 So. 2d 106 (Fla. 1989)).

In this proceeding, neither party alleges that it was denied procedural due process, nor does either party challenge that the Commission's resolution departed from the essential requirements of the law. At issue here is simply whether the Commission's decision is supported by substantial competent evidence.

A. *Substantial Competent Evidence*

Petitioner contends that the Commission's decision to deny her application was not supported by substantial competent evidence.

> Substantial evidence is such evidence as will establish a substantial basis of fact from which one fact at issue can be reasonably inferred, i.e. such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. To be competent the evidence relied on to sustain the ultimate finding should be sufficiently relevant and material so that a reasonable mind would accept it as adequate to support the conclusion reached.

Metropolitan Dade County v. Blumenthal, 675 So. 2d 598, 608 (Fla. 3d DCA 1996) *citing City of Ft. Lauderdale v. Multidyne Medical Waste Management, Inc.,* 567 So. 2d 955, 957 (Fla. 4th DCA 1990).

In this case, Petitioner presented strong evidence in support of her application, which conformed with the Dade County Code requirements for daycare centers. *See* Article XA, Sec. 33-151.11 et seq. Dade County Code (1996). Professional staff which is trained in reviewing applications for compliance with local codes and regulations compiled reports of the petition. Each agency that reviewed the unusual use proposal recommended approval, and stated that the proposal conformed with the county Comprehensive Development Master Plan (CDMP). The recommendations of a professional planning staff constitute substantial competent evidence. *Hillsborough County Board of County Commissioners v. Longo,* 505 So. 2d 470, 471 (Fla. 2d DCA 1987); *Metropolitan Dade County v. Fuller,* 515 So. 2d 1312, 1314 (Fla. 3d DCA 1987).

The focus of this court's review, however, is whether there is substantial competent evidence to support the decision that was actually made by the Commission. *Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598, 606 (Fla. 3d DCA 1996). If there is substantial competent evidence to support the Commission's decision, then any evidence in opposition to that decision is irrelevant. *Metropolitan Dade County v. Fuller,* 515 So. 2d 1312, 1314 n. 5 (Fla. 3d DCA 1987). ``When the facts are such as to give the County Commission a choice between alternatives, it is up to the County Commission to make that choice -- not the circuit court." *Blumenthal,* 675 So. 2d at 606. Therefore, this court must examine whether an objective review of the record reveals that there are facts and substantial competent evidence to support the findings of the Commission as stated in the Resolution. *Id.* at 604.

At the Commission hearing, several neighbors testified against the daycare center. Some neighbors worried that it would drive their property values down. (T. p. 15). Some argued that the ``chaos" of children being dropped off and picked up would potentially lead to ``tragic accidents." (T. p. 8). Nearly everyone who testified argued that 137th Ave. was too heavily travelled for a daycare center. (T. pp. 8, 13, 16, 17) . And some neighbors worried that the daycare center would turn the area into a commercial area. (T. pp. 18, 20). While arguing that the daycare center would ruin the character of their residential neighborhood, the residents also argued that the street bordering their neighborhood was too busy and dangerous for a daycare center. The testimony from the neighbors themselves presented a conflicting image of the character of the neighborhood.

It is well settled that citizen testimony in a zoning matter is permissible, and qualifies as substantial competent evidence as long as it is fact-based. *City of Apopka v. Orange County,* 299 So. 2d 657, 659 (Fla. 4th DCA 1974). *See also Debes v. City of Key West,* 22 Fla. L. Weekly D827 (Fla. 3d DCA April 2, 1997); *Metropolitan Dade County v. Blumenthal,* 675 So. 2d 598, 609 (Fla. 3d DCA 1996); *Grefkowicz v. Metropolitan Dade County,* 389 So. 2d 1041, 1042 (Fla. 3d DCA 1980). General statements opposing the zoning matter are to be disregarded, but fact-based testimony should be considered. *Blumenthal* at 607.

At the Commission hearing, Petitioner addressed each of the neighbors' concerns and demonstrated that there was fact-based evidence which contradicted their opinions and fears. The different county departments that

evaluated the proposal had made specific findings as to the character of the area and the compatibility of the daycare center with the area. (R. pp. 113, 121-23, 135-137). One of the agencies conducted a study on the potential traffic impact and found that the location of the center would not increase traffic. (R. p. 123). The daycare center is an unusual use, and county departments had specifically addressed the issue of whether its approval would lead to an increase in commercial activity in the area, and had determined that it would not. (R. p. 115, T. pp. 26-27). This evidence contradicts the statements of the residents and indicates that they did not present fact-based testimony as a whole, but rather generalized fears and opinions.[1]

Simply because the neighbors stated that the daycare center would not be compatible with the area does not, without factual support, amount to evidence upon which the County Commission could reasonably rely. *See Blumenthal* at 607; *City of Apopka v. Orange County,* 299 So. 2d 657, 659 (Fla. 4th DCA 1974).

Because Petitioner applied for an unusual use, she was required to meet the criteria set forth in §33-311(A)(3)[2] of the Dade County Code. If she met the criteria, the burden shifted to the county to demonstrate by substantial competent evidence that the requested unusual use would not be compatible with the surrounding area or would not serve the public interest. *Metropolitan Dade County v. Fuller,* 515 So. 2d 1312 (Fla. 3d DCA 1987).

Section 33-311(A)(3) states in relevant part:

> . . . unusual uses which by the regulations are only permitted upon approval after public hearing; provided the applied for exception or use . . . would not have an unfavorable effect on the economy of Dade County, Florida, would not generate or result in excessive noise or traffic, cause undue or excessive burden on public facilities, including water, sewer, solid waste disposal, recreation, transportation, streets, roads, highways or other such facilities, . . . tend to create a fire or other equally or greater dangerous hazards, or provoke excessive overcrowding or concentration of people or population, when considering the necessity for and reasonableness of such applied for exception or use in relation to the present and future development of the area concerned and the compatibility of the applied for exception or use with such area and its development.

The petition is also required to be compatible with the Dade County Comprehensive Development Master Plan (CDMP). Additionally, petitions for daycare centers are regulated by Article XA, Sec. 33-151.11 et seq. Dade County Code (1996). The record shows that the Petitioner met all of the requirements of Article XA.

The county argues that since the resolution of the Commission states, that ``the requested unusual use . . . would not be compatible with the area and its development," the Petitioner did not meet her initial burden of proof in showing compliance with the requirements of the Code. Specifically, the county argues that there is substantial competent evidence that Petitioner did not comply with the CDMP provision which states that in low density residential neighborhoods, daytime uses such as daycare centers ``should locate only on sites that are transitional to higher density or higher intensity land uses, to public uses or to other areas of high activity or accessibility." CDMP at I-13. The county argues that based upon the evidence presented, there is substantial competent evidence to support a conclusion that the subject site is not ``transitional to" a higher density or higher intensity land use or to other areas of high activity or accessibility.

The county argues that a reasonable mind could easily conclude that 137th Avenue does not constitute an area of high activity or accessibility, and that if the CDMP had meant to include roads as high activity areas, it would have so stated. Therefore, the county argues, that under the Petitioner's interpretation,[3] all homes located next to busy roads would be ``transitional to" an area of high activity, and would be suitable for such daytime activity as daycare centers. *Id*. at 11.

The county points to aerial maps of the area which show that there is a median strip down 137th Ave., and the townhouse community across the street from the proposed site is walled in, as indicative that a reasonable mind could conclude that the area was not one of high activity. However, the county offers no support for its argument about the intent of the CDMP, other than a request that this court follow the county's interpretation of the CDMP. There is ample evidence in the record that the many professional county agencies that reviewed Petitioner's

application considered 137th Ave. to be an area of high activity and accessibility under the CDMP. (See T. p. 33, R. pp. 42, 47). While there is evidence in the record which could be construed to indicate that the area was not high intensity, it is scant, and does not rise to the level of competent or substantial in order to sustain a conclusion.

The testimony of the neighbors that the daycare center was an incompatible use for their residential neighborhood is opinion rather than fact. *Supra* pp. 4-5. The Commission could not reasonably rely on the testimony of the neighbors as substantial competent evidence to support its opinion that the daycare center was incompatible with the area.

The county also mentions that the ``Commission could also have found incompatibility based upon the testimony of Dade County's Planning Director, who testified that the requested unusual use would be `more intense than the single family' uses surrounding the proposed site." (Appellee's Answer Brief p. 12, n. 6).

While the Planning Director, Mr. Olmedillo, in response to questioning by one of the Commissioners, did state that the daycare center was ``more intense than the single family" (T. p. 34), he also stated that according to the Master Plan, the daycare center was a potentially compatible use. He stated that ``[t]he Master Plan looks for locations which are major roadways, (sic) 137th Avenue, that major roadway." (T. p. 33). He also stated that the roadway was ``the primary circumstance" they determined the proposed site was compatible. *Id.* Additionally, in his written recommendation to the Commission, the Planning Director specifically noted, ``the child care facility will provide a transition from the heavily travelled S.W. 137 Avenue to the intensely developed zero-lot line subdivisions to the east." (R. p. 120).

When taken in context with his entire statement to the Commission, Mr. Olmedillo's response to one of the commissioner's questions does not rise to the level of substantial competent evidence upon which a reasonable person would rely to make a determination that the daycare center was incompatible with the community.

The record before us adequately establishes that the Petitioner met her initial burden to prove compliance with §33-311(A)(3) of the Dade County Code. Therefore, the burden shifted to the county to prove by substantial competent evidence that the application would not serve the public interest or would not be compatible. *Irvine v. Duval County Planning Commission*, 495 So. 2d 167 (Fla. 1986); *Metropolitan Dade County v. Fuller,* 515 So. 2d 1312 (Fla. 3d DCA 1987). The county did not meet its burden.

The county also argues that since Petitioner's proposed use was a commercial, for-profit use, this court should follow the decision in *Grefkowicz v. Metropolitan Dade County*, 389 So. 2d 1041 (Fla. 3d DCA 1980), and affirm the Commission's decision. The county asserts that since the daycare center is strictly for a commercial purpose, the Commission had substantial competent evidence that such a use would be incompatible with the neighborhood. If this court were to apply *Grefkowicz* in this instance, it would set a dangerous precedent that conflicts with the letter and intent of the CDMP.

Nowhere in the Educational and Child Care Facilities chapter of the Dade County Code is a distinction drawn between for-profit and not-for-profit enterprises. The chapter distinguishes between private and public facilities. The Ordinance permits nurseries, and the CDMP specifically allows them to be placed in residential neighborhoods without any distinction between for-profit and not-for-profit. See CDMP at I-13. The Commission cannot then make a narrower distinction than either the Ordinance or the CDMP provides. *See Mandelstam v. City Commission of South Miami*, 539 So. 2d 1139 (Fla. 3d DCA 1988).

As previously stated, the objections by the neighbors as to the daycare center's incompatibility, do not constitute substantial competent evidence in this case because they are not fact-based objections. Additionally, their objections to the center on the grounds that it is a commercial enterprise are irrelevant.

The record before us shows, at best, scant evidence to potentially support the County's determination which in no way rises to the level of substantial competent evidence. The unfounded opinions of the neighbors are shown to be refuted by factual studies conducted by the appropriate county agencies. The opinion of the County Planning Director is consistently in favor of the plan in both his written and oral testimony, despite the county's

attempt to indicate otherwise. The Commission's decision lacked substantial competent evidence. We therefore grant certiorari and reverse the same.

REVERSED and REMANDED to the Dade County Commission with directions to grant the application in question.

Certiorari Granted.

-- -- -- --

[1]The facts which the neighbors did testify to, which the county could base its decision on as substantial evidence, were that 137 Ave. is a heavily travelled road, that there are trucks which frequently travel that road, and that there are four to five daycare centers in the area.

[2]In their briefs, the parties refer to this provision as §33-311(d).

[3]This is also the interpretation of the professional county agencies.

* * *

Pagination

* So. 2d

Majority Opinion > Table of Cases

District Court of Appeal of Florida
Third District

Arturo Chabau et al., Appellants,
v.
Dade County and Key Biscayne Property Taxpayer's Association, Inc., Appellees.

No. 80-761.

June 17, 1980

Rehearing Denied July 21, 1980

John G. Fletcher, Coral Gables, for appellants.

Robert A. Ginsburg, County Atty. and Stanley B. Price, Asst. County Atty., Mann & Dady and Stanley J. Mann, Miami, for appellees.

Before HENDRY, NESBITT and BASKIN, JJ.

[*130] PER CURIAM.

Appellants Chabau and others want to erect an apartment building on Key Biscayne; some 800 Key property owners disapprove of their planned construction. The corporate appellee (hereinafter "association") professes its authority to represent the individual property owners in their opposition to appellants' request for zoning variances. The association appealed to the Dade County Board of County Commissioners from the Zoning Appeals Board's decision approving the variances. After the association's appeal was made, but before a decision was rendered by the Commissioners, appellants sought a writ of prohibition in the circuit court. Their petition was denied, and appeal to this court was taken from the denial. The petition and appeal challenge the subject-matter jurisdiction of the Board of County Commissioners, which ultimately overruled the Zoning Appeal Board's decision: According to appellants, the Board of County Commissioners was without authority to overturn the decision of the lower administrative tribunal, because the association lacked standing to appeal to that Board. We agree that the association was without standing to appear before the Board of County Commissioners, and reverse the ruling of the circuit court.

We are referred by both parties to 33-313, Dade County Code (1979):

> Any appealable decision of the zoning appeals board may be appealed by an applicant, governing body of any municipality, if affected, or any aggrieved party whose name appears in the record of the zoning appeals board. . . .

Thus, if the association were not an "aggrieved party", it could not properly appeal to the Board of County Commissioners, that Board could not review the decision of the Zoning Appeals Board, and any decision of the Commissioners would be void ab initio.

It is clear that a representative association, such as appellee, could not sue in state courts; it would have no standing, unless it, rather than its members, had suffered some special injury. *United States Steel Corp. v. Save Sand Key, Inc.*, 303 So.2d 9 (Fla.1974); *Hemisphere Equity Realty Corp. v. Key Biscayne Property Taxpayer's Association, Inc.*, 369 So.2d 996 (Fla.3d DCA 1979). The association urges, however, that if it is not "aggrieved" sufficiently to have state court standing, it nevertheless is aggrieved for purposes of review by the Board of County Commissioners.

Although the appellees have referred us to two foreign decisions in which the requirement of aggrievement was lowered to facilitate administrative appeal by representative groups, we are not disposed to embrace their holdings. *Contra our decision*, *Douglaston Civic Association, Inc. v. Galvin*, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974); *East Camelback Homeowners Association v. Arizona Foundation for Neurology and Psychiatry*, 19 Ariz.App. 118, 505 P.2d 286 (1973).

If Dade County wishes to liberalize access to its local tribunals, it may undertake to do so.

We have considered the other arguments of appellees, and find them to be similarly without merit. Therefore we have concluded that the circuit court erred in denying the writ of prohibition.

For the reasons stated the order appealed is reversed.

Reversed.

Table of Cases

United States Steel Corp. v. Save Sand Key, Inc., 303 So.2d 9 (Fla.1974)

Hemisphere Equity Realty Corp. v. Key Biscayne Property Taxpayer's Association, Inc., 369 So.2d 996 (Fla.3d DCA 1979)

Douglaston Civic Association, Inc. v. Galvin, 36 N.Y.2d 1, 324 N.E.2d 317, 364 N.Y.S.2d 830 (1974)

East Camelback Homeowners Association v. Arizona Foundation for Neurology and Psychiatry, 19 Ariz.App. 118, 505 P.2d 286 (1973)

Pagination

* So. 2d

Majority Opinion > Table of Cases

District Court of Appeal of Florida
Fourth District

The City of Apopka, Florida, et al., Appellants,
v.
Orange County, a political subdivision of the State of Florida, and Clarcona Improvement Association, Appellees.

No. 73-273.

February 22, 1974

On Rehearing April 11, 1974

William G. Mitchell, of Giles, Hedrick & Robinson, Orlando, for appellants.

Steven R. Bechtel, of Mateer & Harbert, Orlando, for appellee Orange County.

Carter A. Bradford, of Bradford, Oswald, Tharp & Fletcher, Orlando, for appellee Clarcona Improvement Assn.

[*658] DOWNEY, Judge.

This is an appeal by the cities of Apopka, Ocoee, and Winter Garden and the Tri-City Airport Authority from a final judgment of the circuit court denying their petition for certiorari which sought review of an order denying appellants' application for a special exception. This is a companion appeal to those consolidated appeals numbered 72-1204 and 72-1209, 299 So.2d 652.

The appellant cities formed the appellant Tri-City Airport Authority pursuant to Chapter 332, F.S.*1971, F.S.*A., commonly known as The Airport Law of 1945, for the purpose of building an airport to serve the three cities and the surrounding area. Appropriate engineering studies were made and various sites for the proposed airport were considered. Finally, the Authority determined that a parcel of property located in Orange County outside any municipality and zoned A-1 was the most suitable site for the proposed airport. The Authority thereafter obtained options to buy that property. Orange County's zoning legislation permits construction and operation of "airplane landing fields and helicopter ports with accessory facilities for private or public use" in an A-1 district as a special exception. Thus, the three cities and the Authority filed an application for a special exception with the Orange County Zoning Board of Adjustment to build their proposed airport. Without entering

any finding of fact, the Zoning Board of Adjustment denied the application on the ground that granting it "would be adverse to the general public interest." On appeal to the Board of County Commissioners a de novo hearing was held with the following result:

> "A motion was made by Commissioner Pickett, seconded by Commissioner Poe, and carried, that the decision of the Board of Zoning Adjustment on December 2, 1971 denying application No. 2 for a Special Exception in an A-1 District for the construction of a proposed Tri-City Airport be affirmed and upheld on the grounds that the granting of the proposed Special Exception would adversely affect the general public and would be detrimental to the public health, safety, comfort, order, convenience, prosperity and general welfare and, therefore, not in accordance with the Comprehensive Zoning Plan of Orange County."

Appellants then filed a petition for a writ of certiorari in the circuit court in accordance with the provisions of the Orange County Zoning Act, Chapter 63-1716, Laws of Florida, as amended, to obtain review of the foregoing decision of the Board of County Commissioners. While the petition for certiorari was pending appellants filed another action in the Circuit Court of Orange County. The new action sought a declaration that implementation of Chapter 332, F.S.*1971, F.S.*A., by the appellants constituted a governmental function thereby exempting appellants from the operation of Orange County zoning regulations.

In order to determine whether there was substantial competent evidence to support the decision below we must of necessity resort to the evidence introduced at the hearing before the Board of County Commissioners. The appellants adduced evidence from (a) the Tri-City Airport Authority consulting engineer, (b) a representative of the Federal Aviation Agency, (c) and a representative of the Florida Department of Transportation, Mass Transit Division. Their testimony showed that there was a definite public need for the airport; that serious in depth studies had been made to determine the most appropropriate location for the airport; that the location in question was the best available considering such factors as (1) convenience to users, (2) land and area requirements, (3) general **[*659]** topography, (4) "compatability with existing land use, plans and land users", (5) land costs, (6) air space and objections, (7) availability of utilities, (8) noise problems, (9) bird habitats and other ecological problems. The mayors of the three municipalities and the members of the Airport Authority also demonstrated that the selection of the site in question resulted from long study and competent advice on the subject. Approval had been received from every interested government agency including the Federal Aviation Administration, the Florida Department of Transportation, and the Florida Department of Air and Water Pollution Control.

The evidence upon which the Board of County Commissioners relied to deny appellants' application came from one abutting owner, Richard Byrd; several other owners within a two to five mile radius of the proposed airport site; a petition signed by some two hundred members of the Clarcona Improvement Association; and approximately thirty-five people in attendance at the hearing who objected but did not testify. Byrd's testimony was mainly directed to his opinion of what the airport would do to construction costs in the area and his opinion of what would happen to zoning in the area as a result of the proposed use. It also developed that Byrd is interested in buying the property proposed to be used as the airport. Several other property owners speculated about what would happen to the area's zoning, complained about the anticipated noise, and generally wanted to keep the status quo in the area. One witness who admitted he was a layman with no special training or

experience advised the Board about his opinion of the damage to the Florida aquifer which would result from the proposed airport.

Although notice to and hearing of the proponents and opponents of an application for a special exception or other zoning change are essential and all interested parties should be given a full and fair opportunity to express their views, it was not the function of the Board of County Commissioners to hold a plebiscite on the application for the special exception. *Rockville Fuel and Feed Co. v. Board of Appeals*, 257 Md. 183, 262 A.2d 499, 504 (1970). As pointed out by Professor Anderson in Volume 3 of his work, American Law of Zoning, *§ 15.27*, pp. 155-156:

> "It does not follow, . . . that either the legislative or the quasi-judicial functions of zoning should be controlled or even unduly influenced by opinions and desires expressed by interested persons at public hearings.
>
> Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:
>
> > 'Public notice of the hearing of an application for exception . . . is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of . . . public health . . . .
> >
> > The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application.'
>
> The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect. While the facts disclosed by objecting neighbors should be considered, the courts have said that:
>
> > 'A mere poll of the neighboring landowners does not serve to assist the board in determining whether the exception **[*660]** applied for is consistent with the public convenience or welfare or whether it will tend to devaluate the neighboring property.'"
>
> (Footnotes omitted.)

Instead the Board's purpose was to make findings as to how construction and operation of the proposed airport would affect the public and base its granting or denial of the special exception on those findings. Cf. *Laney v. Holbrook*, 150 Fla. 622, 8 So.2d 465, *146 A.L.R. 202* (1942); *Veasey v. Board of Public Instruction*, Fla.App.1971, 247 So.2d 80.

The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by

any competent facts. Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly, we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for.

The judgment appealed from is therefore reversed and remanded to the circuit court with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application for special exception.

If the decision of the board is deemed to be arbitrary or unreasonable the aggrieved party will then have the option of a judicial review by certiorari pursuant to Florida Appellate Rules or a trial de novo in the circuit court pursuant to the Rules of Civil Procedure. *Section 163.250* F.S.*1971, F.S.*A.

Reversed and remanded with directions.

WALDEN and MAGER, JJ., concur.

ON PETITIONS FOR REHEARING.

PER CURIAM.

On petitions for rehearing the parties have advised this court that Orange County has not taken formal suitable action declaring its election to proceed under the provisions of Part II of the act entitled County and Municipal Planning For Future Development (*163.160-163.315, F.S.1971, F.S.*A.). Accordingly, the petitions for rehearing filed by the parties are granted and we recede from all references in our opinion of February 22, 1974, to the availability of *Section 163.250*, F.S.*1971, F.S.*A., in this case.

We maintain the view however, that the judgment appealed from should be reversed with directions to grant the writ of certiorari and to remand the cause to the board of county commissioners for another de novo hearing on the application for a special exception, at which time said board will have the opportunity to apply the balance-of-interests test to the evidence adduced before it. Thereafter, any aggrieved party may have that decision reviewed by the circuit court on petition for certiorari pursuant to the provisions of Chapter 63-1716, Special Acts of Florida, as amended.

WALDEN, MAGER and DOWNEY, JJ., concur.

Table of Cases

Rockville Fuel and Feed Co. v. Board of Appeals, 257 Md. 183, 262 A.2d 499, 504 (1970)

Laney v. Holbrook, 150 Fla. 622, 8 So.2d 465, *146 A.L.R. 202* (1942)

Veasey v. Board of Public Instruction, Fla.App.1971, 247 So.2d 80

Pagination

* So. 2d

Majority Opinion > Table of Cases

Supreme Court of Florida
, En Banc

Peter De Groot, Appellant,
v.
L. S. Sheffield et al., Appellees.

May 29, 1957

As Amended on Denial of Rehearing June 26, 1957

Coffee & Coffee, Jacksonville, for appellant.

Elliott Adams and McCarthy, Lane & Adams, Jacksonville, for appellees.

[*913] THORNAL, Justice.

Appellant DeGroot, who was relator below, seeks reversal of an order of the Circuit Judge dismissing his petition for a writ of mandamus which was sought to compel the appellees to reinstate the relator as an employee of the Duval County School Board.

The determining question is whether the action of the County Civil Service Board, which supervises the county merit system, can be reviewed and collaterally assaulted as a defense to a mandamus proceeding.

Relator Peter DeGroot had been an employee of the Duval County School Board for about eighteen years prior to February 9, 1955. For the last ten years he held the position of "Supervisor of Construction." Since 1943 he was in the classified service under the Duval County Civil Service Act. See Chapter 22263, Laws of Florida, Acts of 1943. On August 4, 1954, the School Board, with the approval of the Civil Service Board, created the position of "Supervising Architect" and filled the job by appointment of a registered architect named Broadfoot. On February 9, 1955, the School Board adopted a resolution delineating the functions of the Supervising Architect, many of which had theretofore been performed by DeGroot, as Supervisor of Construction. By the same resolution the School Board proposed that the position of Supervisor of Construction be abolished.

Section 7, Chapter 22263, Laws of Florida, Acts of 1943, provides in part as follows:

> "* * * No position in the classified [service] shall be abolished without the approval of the Civil

Service Board. Positions may be abolished only in good faith."

Pursuant to this requirement, the School Board resolution was submitted to the County Civil Service Board which, after an extended hearing, declined to approve the resolution defining the duties of the Architect and abolishing the position of Supervisor of Construction.

Despite the action of the Civil Service Board, the School Board proceeded to dismiss DeGroot from his employment. He thereupon instituted this action in mandamus to compel reinstatement. In the mandamus proceeding the parties stipulated that the transcript of the testimony offered **[*914]** before the Civil Service Board could be filed in evidence. A motion to quash the alternative writ was likewise filed. Upon consideration of the record thereby presented, the trial judge concluded that regardless of the judgment of the Civil Service Board, the action of the School Board in resolving to abolish the position of Supervisor of Construction was taken in good faith and that therefore DeGroot was subject to dismissal. He thereupon granted the respondents-appellees' motion to dismiss the petition in mandamus and entered final judgment in their favor. Reversal of this judgment is here sought.

It is contended by the appellant-relator that the decision of the Civil Service Board was not subject to collateral attack by the respondents in the mandamus proceeding. He further contends that if review of that order were desired by the respondents, they should have proceeded by way of certiorari and that in all events the trial judge could not re-weigh the evidence presented to the Civil Service Board.

It is the position of the appellees that the order of the Civil Service Board should not be enforced in the absence of supporting substantial evidence and that the decision of the Board could be reviewed by the Circuit Judge regardless of the nature of the proceeding to determine whether there was substantial evidence in support thereof.

We are here squarely confronted with the problem of determining the appropriate procedure for obtaining review of an order of an administrative agency. Although administrative agencies have been known to the law for many years, it has only been within fairly recent years that a substantial body of jurisprudence has developed with reference to so-called "administrative law." Because of the expansion of the number of boards, commissions, bureaus and officials having authority to make orders or determinations which directly affect both public and private rights, there has been an increasing number of cases involving the extent of the authority of these agencies as well as the validity or correctness of their conclusions in particular instances. We are told that in our state government there are over one hundred boards, bureaus and officials engaged in administrative activities affecting the rights and property of individuals as well as the public. See French's Research in Florida Law, p. 54; 1 Florida Law and Practice, Administrative Law, Sec. 30. In addition there are innumerable county and city boards and agencies such as Civil Service Boards and other boards that perform similar functions.

Although over the years many cases in one form or another have come to this court involving the correctness of orders of administrative agencies, we are unaware of any that has squarely and directly raised the problems presented by the instant appeal. Despite the local nature of the particular problem at hand, it appears to us that it is appropriate to undertake to reconcile many of our previous apparently divergent opinions in an effort to establish for the future some orderly procedure in disposing of problems of this nature. We do this also in

fairness to the trial judge who undoubtedly was confronted with some of these conflicting viewpoints but who did not have available the opportunity for detailed research that accompanies appellate review. Nonetheless, as pointed out by Kenneth Culp Davis in 44 Illinois Law Review p. 565, "No branch of administrative law is more seriously in need of reform than the law concerning methods of judicial review." This author then observes, "No other branch is so easy to reform." The reviewability of an administrative order depends on whether the function of the agency involved is judicial or quasi-judicial in which event its orders are reviewable or on the contrary whether the function of the agency is executive in which event its decisions are not reviewable by the courts except on the sole ground of lack of jurisdiction. In the latter event the order is, of course, subject to direct or collateral attack.

It is in some measure insisted in the case before us that the decision of the **[*915]** Civil Service Board is beyond the scope of judicial review. The contention to this end is that the ultimate decision of the Board is executive in nature and beyond the reach of the courts. In *Bryan v. Landis*, 106 Fla. 19, 142 So. 650, it was pointed out that where one holds office at the pleasure of the appointing power and the power of appointment is coupled with the power of removal contingent only on the exercise of personal judgment by the appointing authority, then the decision to remove or dismiss is purely executive and not subject to judicial review. In the same opinion, however, we pointed out that if removal or suspension of a public employee is contingent upon approval by an official or a board after notice and hearing, then the ultimate judgment of such official or board based on the showing made at the hearing is subject to appropriate judicial review. The reason for the difference is that when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive. See also, *Owen v. Bond*, 83 Fla. 495, 91 So. 686; *Sirmans v. Owen*, 87 Fla. 485, 100 So. 734; *State ex rel. Tullidge v. Hollingsworth*, 103 Fla. 801, 138 So. 372; *State ex rel. Hatton v. Joughin*, 103 Fla. 877, 138 So. 392; *State ex rel. Pinellas Kennel Club v. State Racing Commission*, 116 Fla. 143, 156 So. 317. In the same cases and similar ones it was held that where an officer or employee is removed pursuant to purely executive authority, the courts will do no more than examine into the existence of jurisdictional facts to determine only the question of the existence of executive jurisdiction.

Applying the rule of these cases to the situation before us it is perfectly obvious that in deciding upon the advisability of abolishing a position in the classified service, the Civil Service Board was exercising a quasi-judicial function. This is so for the reason that it arrived at its decision after a full hearing pursuant to notice based on evidence submitted in accordance with the statute here involved. This being so its ultimate decision was subject to judicial review in an appropriate proceeding. *State ex rel. Williams v. Whitman*, 116 Fla. 196, 150 So. 136, 156 So. 705, *95 A.L.R. 1416*; *West Flagler Amusement Co. v. State Racing Commission*, 122 Fla. 222, 165 So. 64; *State ex rel. Hathaway v. Williams*, 149 Fla. 48, 5 So.2d 269; *Hammond v. Curry*, 153 Fla. 245, 14 So.2d 390

Having determined the nature of the order under consideration we next proceed to ascertain the appropriate method of obtaining review as well as the scope of review available. It must be conceded that over the years orders of administrative agencies have been placed under scrutiny in Florida in both mandamus and certiorari cases. Admittedly, little attention has been given to the propriety of the procedure in particular cases. Hence the resultant confusion. We interpolate that we pretermit in this instance any discussion of the proper use of the equity injunction and the writ of prohibition. Injunction has been many times employed to assault legislative

action at the state and local level where such action allegedly impinged on some constitutional right. Attacks on municipal zoning ordinances are typical. Prohibition has at times been employed as against quasi-judicial action of administrative agencies where the agency proposed to exceed its jurisdiction or exercise jurisdiction which it did not have. We further mention that we are discussing herewith appellate review in situations where applicable statutes fail to provide specific methods of review as was the case here. When the statute provides the appellate procedure, that course should be followed. *Curry v. Shields*, Fla.1952, 61 So.2d 326, 327; *State ex rel. Coleman v. Simmons*, Fla.1957, 92 So.2d 257.

Recurring to the problem at hand we are reminded that certiorari is a discretionary writ bringing up for review by an appellate court the record of an inferior tribunal or agency in a judicial or quasi-judicial **[*916]** proceeding. The writ is available to obtain review in such situations when no other method of appeal is available. *Lorenzo v. Murphy*, 159 Fla. 639, 32 So.2d 421. In certiorari the reviewing court will not undertake to re-weigh or evaluate the evidence presented before the tribunal or agency whose order is under examination. The appellate court merely examines the record made below to determine whether the lower tribunal had before it competent substantial evidence to support its findings and judgment which also must accord with the essential requirements of the law. It is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault.

We have used the term "competent substantial evidence" advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry*, 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent." Schwartz, American Administrative Law, p. 88; The Substantial Evidence Rule by Malcolm Parsons, Fla. Law Review, Vol. IV, No. 4, p. 481; *United States Casualty Company v. Maryland Casualty Company*, Fla.1951, 55 So.2d 741; *Consolidated Edison Co. of New York v. National Labor Relations Board*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126.

As contrasted to certiorari, mandamus is an original proceeding to enforce a clear legal right to the performance of a clear legal duty. It is not an appellate writ. As in any original proceeding the record and evidence are made and offered in that proceeding. While it is by nature discretionary it is not an appropriate process to obtain a review of an order entered by a judicial or quasi-judicial agency acting within its jurisdiction. When thus analyzed it is obvious that certiorari and mandamus serve two entirely different functions.

In delineating the distinctions between certiorari and mandamus we disclaim any allegiance to the formalities and technicalities of the past. Procedural formalities are not necessarily sacrosanct merely because they are time-honored. Nonetheless, in situations such as the one before us, the distinctions have a present and vital importance in determining the issues presented by the litigants and considered by the trial court. We think the lines of demarcation are justifiable in a field such as administrative law which is still in its formative stages of

development.

Applying the foregoing general rules to the situation presented by this record it becomes apparent that the assault made by the respondents-appellees on the order of the Civil Service Board as a defense to the mandamus proceeding was entirely collateral to the quasi-judicial proceeding had before the Civil Service Board itself. No direct review of the order of the Civil Service Board was sought by the appellees. The Civil Service Act specifically required the approval of the Civil Service Board as a condition precedent to the abolition of the job in the classified service. Prior to dismissing the appellant-relator the School Board had failed in its effort to obtain such approval. If it had been dissatisfied with the order of the Civil Service **[*917]** Board such order was subject to appropriate review by certiorari. When the mandamus proceeding was filed by the relator, the order of the Civil Service Board declining to abolish the job held by the relator was in full force and effect. There is no assault on the jurisdiction of that board. The job therefore had not been legally abolished. This being so, the relator under the Civil Service Act was entitled to continue to fill the job and his dismissal was without justification. Freeman on Judgments (5th ed.) Vol. 3, Sec. 1258; 42 Am.Jur., Public Administrative Law, Sec. 159, 160; *State ex rel. Spruck v. Civil Service Board*, 226 Minn. 240, 32 N.W.2d 574.

We mention in passing that there were no charges before the Civil Service Board that relator had failed in any measure to perform his job well. The sole issue revolved around abolishing the job that he held.

In view of the foregoing, from the showing made by this record, the relator was entitled to the issuance of a peremptory writ. It was error to dismiss his petition therefor. The judgment under review is therefore--

Reversed.

TERRELL, C. J., and THOMAS, HOBSON, ROBERTS, DREW and O'CONNELL, JJ., concur.

On Rehearing

PER CURIAM.

The last sentence of our opinion of May 29, 1957, is amended to read as follows:

> "The judgment under review is therefore reversed without prejudice to any rights which the appellees may have under the rules announced in *State ex rel. Dresskell v. City of Miami*, 153 Fla. 90, 13 So.2d 707".

When addressed to the opinion as amended, the petition for rehearing is denied.

TERRELL, C. J., and THOMAS, ROBERTS and THORNAL, JJ., concur.

Table of Cases

Bryan v. Landis

, 106 Fla. 19, 142 So. 650

Owen v. Bond, 83 Fla. 495, 91 So. 686

Sirmans v. Owen, 87 Fla. 485, 100 So. 734

State ex rel. Tullidge v. Hollingsworth, 103 Fla. 801, 138 So. 372

State ex rel. Hatton v. Joughin, 103 Fla. 877, 138 So. 392

State ex rel. Pinellas Kennel Club v. State Racing Commission, 116 Fla. 143, 156 So. 317

State ex rel. Williams v. Whitman, 116 Fla. 196, 150 So. 136, 156 So. 705, *95 A.L.R. 1416*

West Flagler Amusement Co. v. State Racing Commission, 122 Fla. 222, 165 So. 64

State ex rel. Hathaway v. Williams, 149 Fla. 48, 5 So.2d 269

Hammond v. Curry, 153 Fla. 245, 14 So.2d 390

Curry v. Shields, Fla.1952, 61 So.2d 326, 327

State ex rel. Coleman v. Simmons, Fla.1957, 92 So.2d 257

Lorenzo v. Murphy, 159 Fla. 639, 32 So.2d 421

Becker v. Merrill, 155 Fla. 379, 20 So.2d 912

Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748

Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521

United States Casualty Company v. Maryland Casualty Company, Fla.1951, 55 So.2d 741

Consolidated Edison Co. of New York v. National Labor Relations Board, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126

State ex rel. Spruck v. Civil Service Board, 226 Minn. 240, 32 N.W.2d 574

State ex rel. Dresskell v. City of Miami, 153 Fla. 90, 13 So.2d 707

Pagination

* So. 2d

Majority Opinion > Table of Cases

District Court of Appeal of Florida
Fourth District

National Advertising Company, Petitioner,
v.
Broward County, a political subdivision of the State of Florida, James Maurer, Edwin Heiss, Joseph M. Clark, Eve Savage, Tony Miglionico, Al Hines, Lonnie Jackson, as members of the Broward County Board of Adjustment, Respondents.

No. 85-1961.

July 30, 1986

Gerald S. Livingston of Gerald S. Livingston, P.A., Orlando, for appellant.

Susan F. Delegal, Gen. Counsel, and Richard Doody, Asst. Gen. Counsel, Fort Lauderdale, for appellee, Broward County.

HERSEY, Chief Judge.

National Advertising Company petitions this court for issuance of a writ of certiorari to the lower court which, acting in its appellate capacity, quashed a variance granted to petitioner by the Broward County Board of Adjustment. With one exception, **[*1263]** we find the issues raised by petitioner to be without merit.

In 1980 petitioner secured a permit to place a billboard at the intersection of Interstate 95 and State Road 84 in Broward County. In violation of both the terms of the permit and the Broward County Code, petitioner constructed a billboard which exceeded thirty-five feet in height.

Upon issuance by the county of a notice of violation, petitioner sought a variance from the Broward County Board of Adjustment. *Section 5-19(2)*(d) of the Broward County Code requires that certain findings be made by the Board before such a variance may be approved. After a hearing--but without making the requisite findings--the Board voted unanimously to grant the variance.

The county then petitioned for certiorari review in circuit court to have the variance quashed, and in July 1985 the petition was granted. The circuit court found that insufficient evidence was presented to the Board to allow the Board to find that the criteria set forth in the county code had been met. The court thus concluded that the Board failed to proceed in accordance with the essential requirements of law. In addition, the court directed the

county to "pursue its remedies for the removal of the sign...."

We conclude that the circuit court did not depart from the essential requirements of law in its finding of insufficient evidence. We note that the argument of petitioner's counsel was the only "evidence" presented in support of petitioner's contention that it had met the necessary criteria. This court has repeatedly admonished that "argument of counsel does not constitute evidence." *Hewitt, Coleman & Associates v. Lymas*, 460 So.2d 467, 468 (Fla. 4th DCA 1984), *rev. denied*, 471 So.2d 43 (Fla.1985); *see also Leon Shaffer Golnick Advertising, Inc. v. Cedar*, 423 So.2d 1015 (Fla. 4th DCA 1982).

We agree, however, with petitioner's contention that the circuit court exceeded the scope of its review by certiorari where it directed the county to take steps to have the sign removed, rather than merely quashing the variance. A court's *certiorari review* power does not extend to directing that any particular action be taken, but is limited to denying the writ of certiorari or quashing the order reviewed. *See Tamiami Trail Tours, Inc. v. Railroad Commission*, 128 Fla. 25, 174 So. 451 (1937); *Gulf Oil Realty Co. v. Windhover Ass'n*, 403 So.2d 476 (Fla. 5th DCA 1981).

In conclusion, we quash that portion of the lower court's order directing the county to take steps to have petitioner's sign removed, but finding no departure from the essential requirements of law in any other respect, the petition is otherwise denied.

CERTIORARI GRANTED in part; DENIED in part.

DOWNEY and WALDEN, JJ., concur.

Table of Cases

Hewitt, Coleman & Associates v. Lymas, 460 So.2d 467, 468 (Fla. 4th DCA 1984), rev. denied, 471 So.2d 43 (Fla.1985)

Leon Shaffer Golnick Advertising, Inc. v. Cedar, 423 So.2d 1015 (Fla. 4th DCA 1982)

Tamiami Trail Tours, Inc. v. Railroad Commission, 128 Fla. 25, 174 So. 451 (1937)

Gulf Oil Realty Co. v. Windhover Ass'n, 403 So.2d 476 (Fla. 5th DCA 1981)

Pagination

* So. 2d

Majority Opinion > Dissenting Opinion > Table of Cases

District Court of Appeal of Florida
Fourth District

Patricia Pollard, Petitioner,
v.
Palm Beach County, a political subdivision of the State of Florida, Respondent.

No. 88-1827.

May 9, 1990

Bruce G. Kaleita, West Palm Beach, for petitioner.

Richard W. Carlson, Jr. and Thomas P. Callan, Asst. County Attys., West Palm Beach, for respondent.

[*1359] PER CURIAM.

This is a petition to review denial of an application for a special exception. The real property in question is located in an area zoned residential. The use for which a special exception was requested is an adult congregate living facility for the elderly, a use permitted by special exception in a residential area.

Certain procedural shortcomings having been remedied, we now treat only the merits, being satisfied that this court has jurisdiction.

After making appropriate application, petitioner obtained approval of the County Zoning Department and, subsequently, the approval of the County Planning Commission. Approval was based upon documentary evidence and expert opinion.

In public hearings before the County Commission, various neighbors expressed their opinion that the proposed use would cause traffic problems, light and noise pollution and generally would impact unfavorably on the area. The County Commission denied the application and the circuit court denied certiorari to review that denial. We grant the writ and quash the order under review.

We explained the respective burdens of an applicant for a special exception and the zoning authority in *Rural New Town, Inc. v. Palm Beach County*, 315 So.2d 478, 480 (Fla. 4th DCA 1975), as follows:

> In rezoning, the burden is upon the *applicant* to clearly establish such right (as hereinabove indicated).

> In the case of a special exception, where the applicant has otherwise complied with those conditions set forth in the zoning code, the burden is upon the *zoning authority* to demonstrate by competent substantial evidence that the special exception *is adverse to the public interest*. Yokley on Zoning, vol. 2, p. 124. A special exception is a permitted use to which the applicant is entitled *unless* the zoning authority determines according to the standards of the zoning ordinance that such use would adversely affect the public interest.

(Emphasis in original; some citations omitted.)

The supreme court, in *De Groot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957), explained in the following language what is meant by the term "competent substantial evidence" in the context of certiorari review:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred.
>
> We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. *Becker v. Merrill*, 155 Fla. 379, 20 So.2d 912; *Laney v. Board of Public Instruction*, 153 Fla. 728, 15 So.2d 748. In employing the adjective "competent" to modify the word "substantial," we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. *Jenkins v. Curry*, 154 Fla. 617, 18 So.2d 521. We are of the view, however, that the evidence relied upon to **[*1360]** sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the "substantial" evidence should also be "competent."

(Some citations omitted.)

In *City of Apopka v. Orange County*, 299 So.2d 657, 660 (Fla. 4th DCA 1974), the "evidence" in opposition to petitioner's application for special exception consisted, as in the present case, of the opinions of neighbors, and in that case we explained:

> The evidence in opposition to the request for exception was in the main laymen's opinions unsubstantiated by any competent facts.
>
> Witnesses were not sworn and cross examination was specifically prohibited. Although the Orange County Zoning Act requires the Board of County Commissioners to make a finding that the granting of the special exception shall not adversely affect the public interest, the Board made no finding of facts bearing on the question of the effect the proposed airport would have on the public interest; it simply stated as a conclusion that the exception would adversely affect the public interest. Accordingly we find it impossible to conclude that on an issue as important as the one before the board, there was substantial competent evidence to conclude that the public interest would be adversely affected by granting the appellants the special exception they had applied for.

Earlier in that opinion we also noted:

> As pointed out by Professor Anderson in Volume 3 of his work, American Law Of Zoning, 15.27, pp. 155-56:
>
> > "It does not follow, ... that either the legislative or the quasi-judicial functions of zoning should be controlled or unduly influenced by opinions and desires expressed by interested persons at public hearings.
> >
> > Commenting upon the role of the public hearing in the processing of permit applications, the Supreme Court of Rhode Island said:
> >
> > 'Public notice of the hearing of an application for exception ... is not given for the purpose of polling the neighborhood on the question involved, but to give interested persons an opportunity to present facts from which the board may determine whether the particular provision of the ordinance, as applied to the applicant's property, is reasonably necessary for the protection of ... public health....
> >
> > The board should base their determination upon facts which they find to have been established, instead of upon the wishes of persons who appear for or against the granting of the application.'
> >
> > The objections of a large number of residents of the affected neighborhood are not a sound basis for the denial of a permit. The quasi-judicial function of a board of adjustment must be exercised on the basis of the facts adduced; numerous objections by adjoining landowners may not properly be given even a cumulative effect."

299 So.2d at 659.

Our review of the record leads us to conclude that there is literally no competent substantial evidence to support the conclusion reached below. The circuit court overlooked the law which says that a special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards of the zoning ordinance that the use would adversely affect the public interest. *Rural New Town*, 315 So.2d at 480. It also overlooked the law which says that opinions of residents are not factual evidence and not a sound basis for denial of a zoning change application. *See City of Apopka*, 299 So.2d at 660.

For these reasons we grant certiorari, quash the order and remand with instructions that the special exception be granted.

HERSEY, C.J., and ANSTEAD, J., concur.

STONE, J., dissents with opinion.

[*1361] STONE, Judge, dissenting.

I would deny certiorari. In my judgment, the record supports the decision of the circuit court upholding the action of the county. I also do not conclude that the trial court overlooked the law.

Table of Cases

Rural New Town, Inc. v. Palm Beach County
, 315 So.2d 478, 480 (Fla. 4th DCA 1975)
De Groot v. Sheffield
, 95 So.2d 912, 916 (Fla.1957)
Becker v. Merrill, 155 Fla. 379, 20 So.2d 912
Laney v. Board of Public Instruction, 153 Fla. 728, 15 So.2d 748
Jenkins v. Curry, 154 Fla. 617, 18 So.2d 521
City of Apopka v. Orange County
, 299 So.2d 657, 660 (Fla. 4th DCA 1974)